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Peter Mosný, Róbert Jáger

The term "slave" in the early feudal state in the area of present-day Slovakia[1]

Abstract: Society in the area of present-day Slovakia during the period of the early feudal state had a specific social structure. In general, the society of the early feudal period was divided into an independent (ruling) class, a partially dependent, and a dependent class (not free, unfree, vassals). The term "not free" is too general, and it may imply many specific meanings. This article answers the question whether the social class of "not free" included slaves. Did slavery exist in the history of our nation? Did slavery exist during the early feudal state in our country – in the state of Greater Moravia and the Hungarian Kingdom until the turn of the twelfth and thirteenth century? The first part describes the structure of early feudal society. The second part deals with the terminological basis of words indicating slaves in their various forms used in different periods of Slovak history (e.g. "servi", "rab", the rank of the family – "čeľaď", and slave). Subsequently, individual forms of slavery existing in our country during the High Medieval Ages are described, and also the legislation governing the legal status of slaves, trading or other disposition with them.

Key words: Slovakia, Hungarian Kingdom, Greater Moravia, Slaves, Slavery.

1. Medieval society in our area

In history, the term slavery has been associated particularly with the countries of antiquity, where the majority of states existed in the form of slave despotisms, while in the younger countries of antiquity they took the form of slave democracies. After the fall of the Roman Empire the institution of slavery in European countries was continuously transposed into the forming states and their laws.[2] It is therefore not surprising that even in the oldest medieval states existing in our area (Greater Moravia and the Hungarian Kingdom), we can use the term slaves to refer to the lowest social stratum of the population.

For the purposes of this paper we will describe the issue of slavery in two state formations existing in our area at different times: in Greater Moravia and the Hungarian Kingdom in the first centuries of its existence. These are two separate political entities, while the fall of Greater Moravia and the establishment of the Hungarian Kingdom are separated from each other by less than a century. However, if we talk about the fall of the Greater Moravian statehood, we refer to the termination of central state power, while the elements of local government persisted and Hungary incorporated them into the newly-built state and administrative machinery.[3] Also, taking this into consideration, the issue of the population structure in these two state formations does not raise such striking differences that would enforce a description of that issue in two separate works, so we will naturally blend their analysis into one.

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[2] See: BEŇA, J.: *Pramene k dejinám práva (stredovek)*. Bratislava: PRAF UK. 2007, p.263.

[3] Matúš Kučera also argues that the fall of Greater Moravia is likely to appear in Slovakia primarily as a political break, and far less as an economic and social break. See: KUČERA, M.: *State a články k slovenskému stredoveku*. Bratislava: Post scriptum. 2012, p. 214.

Due to the inadequacy of development of various forms of employment (known from later stages of its development), based on the performance of which the membership of professions was later determined, in the studied period the fundamental attribute of population stratification into communities and social classes was the possession of land. Therefore, in the Central European type of country before its feudalisation, anyone who had unlimited possession or ownership of the land was free. Those who had possession of the land only conditionally (had possession under certain conditions) were conditionally free. Those who failed to own or hold land were unfree. Slaves, however, at any given time, were a minority: as stated by Kučera, slavery relations of production are not relations determining social relations and they only occur sporadically.[4] The literature describing this social layer of the population in the early feudal state existing in our area uses the rather general Latin term *servi* or the Slavic term *rabi*. The terms slaves, *servi* or unfree allow for multiple interpretations.[5] For the purposes of this paper, in order to prevent inaccuracies in interpretation, we will use the term slaves as follows: slaves are the social class without legal personality, so slaves are the object of law.

We have a lot of evidence of the existence of slavery in this part of Europe: it is clearly dominated by written evidence, whereas in contrast the archaeological evidence is minimal. It would be quite difficult to find archaeological evidence of the existence of slavery: whilst it is possible to determine the level of wealth or lack of means and social status of an individual from the skeletal remains and tombfurnishings, it is difficult to clearly determine whether these were the remains of only a very poor individual, or whether it was a slave. In the past, several archaeological excavations were carried out in Slovakia, especially of sites existing at the time of Greater Moravia (e.g. Skalica,[6] Lupka pri Nitre[7], or the burial site at Veľký Grob[8]). The results of these studies confirm the stratification of the population into three social classes, but this research failed to identify the existence of slavery based on direct evidence (however, it was not the purpose of those archaeological excavations to do so). Yet some scientists argue that we have at least one piece of archaeological evidence of the existence of slavery even from the time of Greater Moravia. A skeleton was found that anthropologists assigned to an individual of black ethnicity. According to some archaeologists, it was a slave.[9]

2. Terminological bases

In contrast to the minimum amount of archaeological evidence of the existence of slavery in the study period, there is plenty of written evidence stemming from this area: this consists in particular of numerous laws governing the legal position of the slaves, but there is also (Slavonic Church) literature that uses the term slave (in its earlier form *rab*).

4 KUČERA, M.: *State a články k slovenskému stredoveku*. Bratislava: Post scriptum. 2012, p. 236.

5 More options on the interpretation of the terms are discussed in the second part of this paper.

6 BUDINSKÝ-KRIČKA,V.: *Slovanské mohyly v Skalici.* Bratislava: SAV, 1959.

7 CHROPOVSKÝ, B.: Slovanské pohrebisko v Nitre na Lupke. In: *Slovenská archeológia*, 1962, No.1, pp.175 – 219.

8 CHROPOVSKÝ, B.: Slovanské pohrebisko z 9. storočia vo Veľkom Grobe. In: *Slovenská archeológia*, 1957, No. 1, pp. 174 – 239.

9 The above example can not be considered irrefutable evidence of the existence of slavery in Greater Moravia, as the said individual of black origin could have just been passing through the territory of Greater Moravia and may have died during this transit and was buried here.

The etymological basis of the Slovak word for "slave" („otrok") existed already in the old Slavic languages.[10] Jireček in his book *Prove – Historický slovar slovanského práva* (Historical Dictionary of Slavic Law) of 1904 mantains that the term is derived from the expression *ot-rok, od-rok, odrieknuť* (to unsay).[11] According to these suggestions, a slave is someone who was given orders orally (as an analogy of this it can be stated that a slave was someone who was "unsaid", whose rights were called off, someone who was not a subject but only an object of law[12]). If we wanted to support the argument of the origin of the word „otrok" from the root *rok-rek* (speak), we could point to other uses of the root of this word: Old Slavonic also contained a word *otЪrečena*, which in addition the the above-mentioned meaning *odrieknuť (*to unsay),[13] also meant *ospravedlnený* (excused) (*otЪrekЪša se, otЪreši se*[14] – to renounce, but also to apologise).[15] The words *otЪrečena, otЪrekЪša se, otЪreši se* are clearly derived from the words expressing speaking (parole). However, the similarity with the word „otrok" is in fact most probably just coincidental: Jireček´s argument about the origin of the word from the term *ot-rok, od-rok* is based on an older and relatively common argument of the Slavists that the root of the word is the original *rek-rok* (speak). This argument, however, is refuted by Šimon Ondruš, who states that the original root of the word „otrok" is the Indo-European expression *terk-lterek,* meaning to move or run. The Slovak word for slave originally sounded like *ob-trok-os* (a person pottering around, servant, slave). This "movement" motivation of the origin of the word is also suggested by other terms used for the secondary serving people: for example *poskok* (dogsbody-running around, stooge) or *pobehaj* (runabout, gofer). The same semantic motivation of the words identifying the person serving can also be found in other Indo-European languages.[16] The

[10] We deliberately use the term in „old Slavic languages". The terms „old Slavic languages" and „Old Slavonic" must not be confused, let alone equated. Old Slavonic language was originally southern Slovakian with a Bulgarian-Macedonian basis. After the mission of Constantine and Methodius the Old Slavonic became a written language and a cultural medium for the majority of Slavic ethnicities, but ordinary people continued to use their old Slavic languages, or old Slavic dialects, which at that time were much closer to each other than today's dialects, and were more mutually comprehensible than at any time thereafter. However, after the Old Slavonic became a language of culture for other Slavic ethnicities (i.e. since the 8th – 9th centuries), it also began to pick up elements of other, local languages. Thus, even in Old Slavonic we can identify the terms that originally referred to the river Danube. For the relation of Old Slavonic to Proto-Slavic and old Slavic languages ,see more: KURZ, J.: *Učebnice jazyka staroslověnského (Textbook of Old Slavonic)*. Praha: SPN. 1969, pp.8 – 9. Reflecting the latest trends in historiography, as far as the area of present-day Slovakia is concerned, we can say that the locally-established population used a form of Old Slovak, while for writing, liturgical, administrative and registration purposes Old Slavonic was used. On the question of the use of the terms „old Slovaks" or „old Slovak" even in the period of Greater Moravia, see more: MAREK, M. Kto žil v 9. storočí na území Slovenska? In: MARSINA,R. – MULÍK,P.: *Etnogenéza Slovákov. Kto sme a odkiaľ pochádzame*. Martin: Matica slovenská. 2011, p.105. MARSINA, R.: *Metodov boj*. Bratislava: Spolok slovenských spisovateľov. 2012, p. 127.

[11] JIREČEK, H.: *Prove – Historický slovar slovanského práva*. Praha, Brno: náklad autora. 1904, p.232. KURZ, J.: *Učebnice jazyka staroslověnského*. Praha: SPN. 1969, p. 52.

[12] MOSNÝ, P. – LACLAVÍKOVÁ, M.: *Dejiny štátu a práva na území Slovenska I. – od najstarších čias do roku 1848*. Šamorín: Heuréka. 2010, p. 47.

[13] MAŃCZAK, W.: *Przedhistorycne migracje slowian pochodzenie jezyka staro-cerkiewno-slowiańskiego.* Krakov: Poľská akadémia vied. 2004, p. 132.

[14] Given that in the program in which this paper is written it is not possible to feature some Cyrillic letters we are forced to use a simplified phonetic transcription of Old Slavonic. We are aware that this transcript fails to represent certain sounds, which may even not be registered in Latin transcription.

[15] Also in the Slovak language, if we use the term „renounce participation", we actually give up participation.

[16] In Indo-European languages the proto-language root *-ser* (to move, run) is richly represented, as in the old Indian *sárati* (flows, runs, rushes). The verb-base *ser-u-* provides the derivation for naming a servant in Latin *ser-u-os* (*servus*). The root *seru,-* was also used for naming a servant in Balto-Slavic. See more: ONDRUŠ, Š.: *Odtajnené trezory slov.* Martin: Matica slovenská, 2004. p.41.

authors of this paper are inclined to agree with Ondruš´s argument for the origin of the word „otrok" from the root *terk-lterek,* meaning to move.

Although we failed to find a direct use of the word „otrok" in all accessible texts written in Old Slavonic, meaning a person serving (in all excerpts accessible to us the only universally-used term was the word *rab*[17]), the fact remains that Old Slavonic surely recognised the term *otrokЪ* as well as the term *otroče* or *otročištЬ* (in Slovak probably the closest term to the term *otroče* would be "*otročiatko*", i.e. a little slave) denoting a child.[18] This is not particularly surprising: in view of the strong position of head of the family among our ancestors, a child was subject to paternal authority. Even in Roman law a form of patriarchal slavery existed in the oldest era, when all descendants were subordinated to the father of the family (or the oldest living male ancestor), not excluding the family and slaves; slaves could well be "lower-ranking members of the family". The oldest form of family life among the ancient Slavs had approximately the same form, so there is a possibility that from the designation for the child, i.e. a subordinate member of the family, the term slave started later to be used also to refer to *non sui juris* or unfree population. Use of the terms *otrokЪ, otroče* či *otročištЬ* meaning "child" as such, points to the existence of a patriarchal form of slavery among the Slavs. The mentioned notion of "slaves" meaning persons subordinate to the oldest living male ancestor, whether in positions of children or persons serving, is also suggested by the meaning of the Old Slavonic word *sěmija* to denote the family (i.e., landlord, wife and children) together with the servants and serfs.[19] The *Etymologický slovník jazyka staroslověnského* (Etymological Dictionary of the Old Slavonic language) highlights the difference between the current term for family „rodina" and the word *sěmija*: while *sěmija* refers to both the blood line and non-blood line including subordinate persons, the term „rodina" is a derivative from the word *rod* (*genus*), and only refers to blood = line persons.[20]

The older term *rab* (written in the Old Slavonic *rabЪ,* exceptionally also in the form of *robЪ*[21], with the female form *rabin´i*[22]) is a commonly-occurring item in works written in Old Slavonic. In the Old Slavonic literature, the term *rab* is used not only in our (Slovak) meaning "slave" but also in the meaning "menial" *(služobník)* or "servant" *(sluha*[23]*)* (which actually is not particularly surprising, since the Latin term *servus*

[17] KURZ, J.: *Učebnice jazyka staroslověnského*. Praha: SPN. 1969, SLANINKA, M.: *Assemanov evanjeliár a kalendár*. Martin: Matica slovenská, 2013. ŽIGO, P. – KUČERA, M.: *Na písme zostalo (dokumenty Veľkej Moravy)*. Bratislava: Perfect. 2012.

[18] Use of the term to denote a slave child was retained even in the current Slovenian (*otročič*).

[19] In: *Etymologický slovník jazyka staroslovienského* (The Etymological Dictionary of Old Slavonic language we find the accound of closest words of Slavic languages to the term *sěmija*: Lithuanian *šeima* family (parents and children), *šeimýna* family and servants, Latvian *saimé* family together with family/servants and family in a broader sense. The fact that the father of the family just did not stand at the head of his biological offspring, but also managed foreign serving persons envisioned in his family indicates the meaning of the phrase „otьcь sěmije" translated not only as head of the family, but also house-holder. JANYŠKOVÁ, I. et al. *Etymologický slovník jazyka staroslověnského*. 13. Praha: Academia. 2006. p. 806.

[20] Ibid.

[21] The termi n this for was also used in e.g. Codex Zograaphensis. JAGIC, V.: *Quattuor evangeliorum Cedex glagoliticus olim Zographensis nunc Petropolitanus*. Gratz 1954. See also JANYŠKOVÁ,I. et al. *Etymologický slovník jazyka staroslověnského*. 13. Praha: Academia. 2006. p. 771. In the following text I will only use a simplified form *rab*.

[22] For the use of this term see more in: KURZ, J.: *Učebnice jazyka staroslověnského*. Praha: SPN. 1969, pp. 63, 64, 214.

[23] KURZ, J.: *Učebnice jazyka staroslověnského*. Praha: SPN. 1969, p. 73. Kurz in translation of the term *rabin´i* uses only the meaning "woman-servant" (pp. 63, 64, 214).

also has this meaning, identically used in Roman law[24] as well as in the Latin written standards of Hungarian law).

Joseph Kurz in his Old Slavonic textbook, when translating the word *rab* uses more frequently the meaning menial *(služobník*[25]*)* and less often the term slave *(otrok*[26]*)*. However, we are of the opinion that the use of the word *rab,* whether meaning only "a boy" or only "a slave", or meaning a servant and a slave as in Kurz´s Old Slavonic textbook, is not quite accurate. The examples of the Old Slavonic text that Kurz submits fail to indicate whether the word *rab* in this context should be translated only as a servant or just as a slave. In fact, most of the text samples allow for an interpretation of the word in both meanings.[27] This may be caused by the fact that in older linguistics it was not necessary to distinguish between the meaning of the word servant and slave. As far as law is concerned, however, these words have vastly different meanings: whereas a man who was a servant (*služobník* or *sluha*) could have been personally free while carrying out the "job" of a servant (*služobník* or *sluha*) for another person, a man who was a slave was not free personally, and this person was not even a subject of law.[28]

The use of the term *rab* in written legal records of the Greater Moravian period gives us more space to understand its importance, in particular given the context in which the term is used. For analysis of the use of the term we have used *Zakon sudnyj ľudem* (Legal Code for the Laity). There we had the Old Slavonic text[29] and three forms of the translation into Slovak.[30] In the original Old Slavonic text we identified a total of 13 instances of the term in various forms *(rab*, *raba*, *rabu*, *rebě*, *rabojo*, *porabotitЪ).* The use of these terms in twelve situations was clearly translated in all three Slovak translations with the meaning of the word "slave" *(otrok).* According to the meaning of the evaluated standards we conclude that in these cases the translation was correct. One different translation in the Slovak versions was found only in the case of the Old Slavonic term *božьjemь rabomь*, which we would simply translate (based on the context as well as as translation) as a "servant of God". Such a translation was found in two texts[31], and the remainder was used to translate the term "priest" *(kňaz).*[32] We understand that in this case, a more appropriate translation is a "servant of God".

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[24] ŠPAŇÁR, J. *Latinsko/slovenský – slovensko/latinský slovník*. Bratislava: SPN, 1998, p. 554. For rhe legislation status of slaves in Roman law, see more: UMB. 2013.

[25] The use of the word *rab* meaning *služobník* (menial) or *sluha* (servant) is provided in: *Učebnice jazyka staroslověnského* on pages 73, 74, 98, 99, 215.

[26] We found the use of the word *rab* meaning *otrok* (slave) in *Učebnice jazyka staroslověnského* only on pp. 49, 216 and 220. In the work *Przedhistorycne migracje slowian pochodzenie jezyka staro-cerkiewno-slowiańskiego* when translating the Old Slavonic word *rab* into all current Slavic languages we never once found a different meaning than the word servant. However, this may be due to the fact that the author provides only the translation of one term in each contemporary Slavic language. MAŃCZAK, W.: *Przedhistorycne migracje slowian pochodzenie jezyka staro-cerkiewno-slowiańskiego.* Krakov: Poľská akadémia vied. 2004. p. 138.

[27] See examples of Codex Zograaphensis, Luke XIV, 16 – 20 and Luke XIV, 21 – 24 on pages 73 and 98. Compare the use of the term *rab* in: Old Slavonic text Luke XIV, 21 – 24 transcribed from Glagolitic into Latin also in the work SLANINKA, M.: *Assemanov evanjeliár a kalendár*. Martin: Matica slovenská, 2013, p. 157 – 159. For more detail see ŽIGO, P. – KUČERA, M.: *Na písme zostalo (dokumenty Veľkej Moravy)*. Bratislava: Perfect. 2012.

[28] MOSNÝ, P. – LACLAVÍKOVÁ, M.: *Dejiny štátu a práva na území Slovenska I. – od najstarších čias do roku 1848*. Šamorín: Heuréka. 2010, p. 47.

[29] ŽIGO, P. – KUČERA, M.: *Na písme zostalo (dokumenty Veľkej Moravy)*. Bratislava: Perfect. 2012, pp. 107 – 115.

[30] KOLÁRIK, J.: *Právne dejiny Slovenska. I. diel.* Bratislava: Eurokódex. 2010. pp. 13 – 19. HUBENÁK, L. *Dokumenty k dejinám štátu a práva na území Slovenska I.* Banská Bystrica: UMB. 1997, pp. 10 – 15.
ŽIGO, P. – KUČERA, M.: *Na písme zostalo (dokumenty Veľkej Moravy)*. Bratislava: Perfect. 2012, pp. 105 – 115.

[31] ŽIGO, P. – KUČERA, M.: *Na písme zostalo (dokumenty Veľkej Moravy)*. Bratislava: Perfect. 2012, p.108. HUBENÁK, L.: *Dokumenty k dejinám štátu a práva na území Slovenska I.* Banská Bystrica: UMB. 1997, p.12.

[32] KOLÁRIK, J.: *Právne dejiny Slovenska. I. diel.* Bratislava: Eurokódex. 2010, p. 14.

On the use of the term *rab* itself, we believe that it has a common basis with the root of the word *rabovati* (plunder), i.e. to steal, rob.[33] Dragging away people and their subsequent sale was a form of slavery formation. The basis of the word *rab* can also be found in contemporary Russian, in the words *ograblěnie, graběž, graběža, rozgrablěnie* which are only forms of our word robbery – *lúpež*. This possibility of the origin of the word *rab* is indicated by the later (Slovak) meaning of the word plunder – *rabovať*. The Historical Dictionary of the Slovak Language provides the term *rabstvo* in the form of imprisonment or captivity – *väznenie* or *zajatie*.[34] And it is the meaning of the word "capture" that is closest in meaning to the basis of the word presupposed by us to document the taking of slaves and selling them into slavery.

It is equally clear that the word *rab* is semantically very close to the root of another word: for example, to the root of the word *rabotať/robotať*, meaning to work (this is also indicated by the use of the word *rab* in the form of *robЪ*[35]). In this sense, the *rab* would be the one who works, or is required to work. This closeness of the word *rab* is indicated by a single use of the word *rabot*, meaning servant in the above-mentioned textbook.[36] If the word *rab* really comes from a common base as the root of the word *robota/rabota*, we could even arrive at the origin of the current term "worker". The form of this word is definitely one of the Slavic appellatives (indicated by the ending *-nik*), which are not of Slovak-wide nature, but are typical only in the Danubian Slavic area: the agent suffix *-nik* refers in general to occupational groups related to the occupation, place or position, i.e. the words associated with the Greater Moravian social or class-divided differentiation (law historians are familiar with terms such as *dvornik, stolnik, pohárnik* or *komorník*). But it is equally possible that the word *robota*, *robotovať* (to perform work), arose reversely from the term *rab*, but the *rab* was the one who performed *robota* (work). This would also be suggested by another word: the word *robotník*, "worker", which would be created by the original form of the word *robota* the "work", but with the agent suffix *-nik*. The word *robotník,* "worker", in this sense is the one who performs *robota* (work). In this case, the *rab* and *robotník* (worker) have a similar meaning; in both cases these persons perform *robota* (work), these are people who work.

When using the word *rab* meaning *služobník* (a menial) or „otrok" (a slave) we would like to point out that Old Slavonic knew the term „sluga" (a servant), whose interpretation (unlike the term *rab*, the interpretation of which has multiple meanings) is clear/unambiguous and is translated only as *sluha* (servant), *služobník* (menial).[37] Šimon Ondruš (similarly to the word for slave) states that the origin of the word *sluha* (servant) was, (similarly to the origin of the word for slave) had a motional motivation (denoting the movement of a serving person).[38]

On the basis of the fact that Old Slavonic also knew the term *sluga*, clearly translated only as *sluha* (servant), *služobník* (menial) we may come to conclusion that, although the translation of the term *rab* into our meaning *otrok* (slave) is rare in ecclesiastical literature,

[33] However, this remains only the opinion of the author, it is not possible to refer to any literature supporting the said.

[34] MAJTÁN, M. – KUCHAR, R. – SKLADANÁ, J.: *Historický slovník slovenského jazyka*. Bratislava: Jazykovedný ústav Ľ. Štúra. 2000, p. 7.

[35] In this form the given term was used e.g. in: Codex Zograaphensis. JAGIC, V.: *Quattuor evangeliorum Cedex glagoliticus olim Zographensis nunc Petropolitanus*. Gratz 1954. JANYŠKOVÁ,I. et al. *Etymologický slovník jazyka staroslověnského*. 13. Praha: Academia. 2006. p. 771.

[36] KURZ, J.: *Učebnice jazyka staroslověnského*. Praha: SPN. 1969, p. 56.

[37] On page 65 of his textbook Kurz uses the term *sluga* six times in its various forms, and it is always translated as servant, menial. KURZ, J.: *Učebnice jazyka staroslověnského*. Praha: SPN. 1969, pp. 64,65.

[38] For more detail see: ONDRUŠ, Š.: *Odtajnené trezory slov.* Martin: Matica slovenská, 2004, p. 41.

the meaning of the word *rab* in the sense of "otrok" (slave) can certainly not be excluded; this is also suggested by the almost exclusive translation of the term *rab* into the Slovak form *otrok* (slave) in the legal texts. Although the linguistic interpretation of the word *rab* allows its translation in a number of meanings, Matúš Kučera argues that the earlier Slavic term *rab* was consistently used in the later period (10th – 12th century) only in the meaning of a slave. He also states that the terms *čeľaď* (menials), *dušník* (soul-man), *otrok* (slave) are also synonyms.[39] On the basis of the above we may conclude that if the language used by our ancestors in Greater Moravia[40] and during the early feudal state demonstrably used (and therefore knew) terms denoting slaves or slavery, then slavery certainly must have existed in this part of Europe.

3. Forms of slavery in the medieval state

Slaves were – as was the case in ancient countries as well as countries in the Middle Ages – the lowest social group. For the economy of those times slaves were necessary goods, without which farming was virtually impossible. Given the relative sufficiency of land, relatively thin population and lack of livestock during the early feudal state in this area, the number and types of slaves belonging to a particular household determined its value. The release of slaves into freedom progressed only slowly, therefore, and their sale abroad was restricted as well.[41] Provisions prohibiting the export and sale of slaves abroad can be found in contemporary law of the neighbouring countries. [42]

Even in the studied period the slaves did not have capacity to possess rights and duties (they did not have any legal personality), and were therefore only the object of law, as it was in Roman law.[43] Their legal status was governed by the law of things, but mostly by legislation on cattle. The most famous example of legislation concerning the position of slaves by analogy with livestock was the regulation of treatment of found slaves: the finder was obliged to hand over to the slave´s master the slaves and cattle who got "lost", and their master was obliged to pay a finder's fee. If it was not possible to identify the master of the lost slave (or cattle), the slaves (or cattle) were to be held until Michaelmas, and if no one came forward to that day they were to be sold and the proceeds of such sales were to be divided as follows: one third to the district administrator *(župan)* and two-thirds to the Royal chamber.[44] If the finder concealed the finding of a slave (or cattle), he could be ordered to pay a fine equal to twice the value of the concealed slave (cattle).[45]

Similarly, as was the case in other contemporary countries, even in countries located in this area during the studied period, slavery could arise most often:

a) **By birth given by a slave-mother**, or by a free woman married to a slave *(servi nativi)*. This method was the most natural way of slavery formation, and, as with species whose young (e.g. calves) were considered the property of the owner of the

[39] KUČERA, M.: *State a články k slovenskému stredoveku*. Bratislava: Post scriptum. 2012, p. 220.

[40] We intentionally do not use the term Old Slavonic, since Old Slavonic was the cultural and literary language of our ancestors, the language in which official or church records were written, but it was not the language spoken by ordinary people. See more: KURZ, J.: *Učebnice jazyka staroslověnského*. Praha: SPN. 1969.

[41] Koloman, I/77.

[42] JIREČEK, H.: *Prove – Historický slovar slovanského práva*. Praha, Brno: náklad autora. 1904, p.233.

[43] Koloman, I/74, 77.

[44] Sv. Ladislav, III/13.

[45] Sv. Ladislav, III/13 §4.

cattle, also the children of slaves were automatically acquired into the ownership of a slave owner. In the event that both parents were slaves of one master, the ownership of the children was not further questioned, and the owner of the slave was the master of both parents. If only one parent was a slave, or both parents were slaves but their owners were different gentlemen, the relevant fact was who was the owner of the slave-mother. If the child was born to a freed woman married to a slave, the child was a slave and belonged to the master of the slave-father.

b) **By war captivity** *(iure belli)* – it is necessary to point out that this title was legitimate even during the early feudal state, as well as normal: the high cost of continuous conduct of wars was paid by the booty acquired (the acquisition of booty was often the main, if not the only motive for leading war expeditions), and one of the ways of increasing the value of booty was taking and selling people into slavery. Thus, not only soldiers of the enemy army but also the people living in enemy territory could have fallen into slavery. Prisoners of war in all the barbarian tribes (in our case, particularly Hungarian tribes) were considered looted inventory and became the fully-fledged property of the owner, who could dispose of them at his own discretion. Not every prisoner of war, however, ended up as a mere slave: prisoners of noble origin were captured to later recover a ransom. (This form of captivity in Hungary was carried out even in times of struggle with the Ottoman sultanate.[46])

Prisoners not of noble birth (i.e. those for whom it was not possible to recover a ransom) were most commonly sold by chiefs of banditry to Ishmaelites and Jews. The oldest law itself stipulated that such trade could only be carried out at the residence of the bishop.[47] The clause on the performance of the slave trade at the bishop's residence was justified by the fact that it would supposedly prevent trade with Christian slaves. However, this provision can not be explained by the fact that the church sought to get rid of Christian slaves: since, if a Jew was caught in possession of a Christian slave, the slave was sold and the price for the slave was received by the Bishop. If in this case the intention had been to get rid of the servile status of Christians, the Christian slave should have been released. The regulation that the slave trade was to take place at the seat of the bishop is rather justified by the fact that a large proportion of trade was conducted by Jews, and according to another provision of the then law, Jews were allowed to occupy only cities that had a bishop.[48]

It is highly likely that some of the slaves dragged from war expeditions ended as menials serving their master, or were settled on uncultivated land and worked in agriculture. Some authors argue that this happened mainly in the area of the old-resident Slavic population, which, as most economically developed, was occupied by the richest and most powerful Hungarian tribal aristocracy. It is likely that for this type of work people were chosen who had previously worked as farmers.[49]

c) **By sale into slavery**. A title transposed from Roman law meant that the father of the children (or spouse of the mother) had the right on the basis of *ius vitae necisque* not only to kill and arbitrarily punish the members of his family, but also to sell them into slavery.[50] This right, however, was enjoyed not only by the father regarding his children, but also by the grandfather regarding his grandchildren (great-grandchildren), i.e.,

[46] See more: KREISER, K. – NEUMANN, CH. K.: *Dějiny Turecka*. Praha: Lidové noviny, 2010.
[47] Koloman, 1, LVI, LVII, LVXXVI.
[48] LUBY, Š.: *Dejiny súkromného práva na Slovensku*. Bratislava: Iura edition. 2002, p. 174.
[49] KUČERA, M.: *State a články k slovenskému stredoveku*. Bratislava: Post scriptum. 2012, p. 218.
[50] E. g. the laws of St. Ladislaus, I/13

persons belonging to his *čeľaď* (extended family, including servants). The reason for sale of a person into slavery was primarily to punish a subordinate member of the family, but the father could do so without any reason. The existence of this form of patriarchal slavery is evidenced by the Old Slavonic term *otročte/otročete,* used to indicate the child. As a relic of this phenomenon, also the current use of the term *otrok* in Slovenian language can be seen, nowadays normally serving to denote a child.[51]

Similarly, the father of the family could give other subordinate family members into pledge. The remains of this institution were preserved in our law even at the time when slavery in our country actually did not exist: even the Tripartitum established that the father could redeem himself from war captivity by giving his child into pledge.[52]

The father's position arising under the *ius vitae necisque* of members belonging to his family frequently lasted until his death, and with the death of the oldest living male representative of the family, heading the family, that power passed to his sons, one of whom assumed the position of the oldest living male representative with regard to his descendants, and thus acquired *ius vitae necisque* over the progeny. Cases in which the *ius vitae necisque* expired during the life of the oldest male family member (the "father of the family") included his civil death,[53] war captivity of the father (whose power, however, was restored after his return)[54], or by dismissal of the son from paternal authority (emancipation).[55]

An interesting institution of contemporary law involved selling daughters into marriage. Although in this case we can not talk about selling daughters into slavery, as was the case with explicit sale of the child into slavery, nonetheless the effective implementation of the act of sale of a daughter into marriage had similar features: the daughter was reviewed on the basis of inspection, an actual purchase price was paid for her and the daughter was handed over (married) or rendered (here a justification can be found of the origins of the meaning of the phrase to "marry a women" (to hand her over)) to the family of the groom as an object of purchase. Given that the purchase price for the bride was paid mostly in goods (mostly fur[56]), we should rather speak of an exchange contract and not of a contract of sale).[57]

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51 JIREČEK, H.: *Prove – Historický slovar slovanského práva*. Praha, Brno: náklad autora. 1904, p. 232.

52 Tripartitum, I/51 § 8.

53 Tripartitum, I/56 § 2.

54 Tripartitum, I/56 § 3.

55 Tripartitum, I/51.

56 Among the southern Slavs the chief commodity of exchange for the bride was the fur of the pine marten. For this reason to this day the southern Slavs have retained the designation *kunka* (little marten) for naming the bride. Moreover the denomination of the Croatian currency *kuna* (marten) has its origin in the use of marten pelts as an exchange commodity.

57 In the pre-Christian era the most common form of marriage conclusion was **kidnapping a woman**. This was not the symbolic entering into marriage, but the actual abduction of a woman by carrying out her seizure, and this form of marriage is also historically documented. The spread of Christianity suppressed this form of marriage also in secular law.The first ruler of Hungary St. Stephen himself forbade the nobility to enter into marriage by abduction of women, and even ordered the restoration of abducted women to their parents, or the payment of a conciliation fine. Another pre-Christian form of marriage, which is also historically reliably proven, is **the buying-selling** of a bride. This form of marriage was arranged by signing of a sale contract, the subject of which was the future bride. This agreement was concluded between the father of the bride and the groom's father. The groom could not conclude this agreement, as he had no legal capacity and had to be represented in this legal act. This contract of sale was no different from the sale contracts for any other thing, and the purchase price for the bride was actually paid. The youngest form of the marriage conclusion was a form of a **marriage contract**, i. e. the arrangement of marriage in such form as we know it today, mostly concluded in the sight of the Church. Even in the earliest period of feudal law, initially, only the will of the engaged couple to enter into matrimony was considered significant.

d) Also a person originally personally free but falling into slavery **punished for specific offences**, could become a slave: marriage with a slave-woman (the reverse did not apply, as a free woman married to a slave remained free). Here we can see a certain departure from the general principle of Hungarian feudal law, under which the woman took on the social status of her husband. Other reasons were: triple intercourse with a slave-woman,[58] concubinage with a priest,[59] and repeated theft, in which case even under the oldest provisions not only the perpetrator of the crime but also his wife and children became slaves (and in this case there was apparently no distinction between children born in or out of wedlock, or children of a putative marriage). The last reported case of a crime followed by enslavement was a breach of judicial duties.[60]

e) Similarly, someone who was **sentenced to the death penalty**, and was pardoned or escaped into asylum became a slave.[61] This provision was part of the Third Book of St. Ladislaus. However, legislation concerning asylum in our country was much older. Art. XVI of *Zakon sudnyj ľudem* itself ordained that those who fled to the temple should not be escorted out using violence, but the refugee should reveal the matter and guilt committed to a priest, and he was to adopt him as a refugee.[62] (This provision is almost identical to the text contained in the Capitular of Charlemagne;[63] here, the question arises of the common origin of these standards).

The purpose of this institution was that a man who found asylum in buildings subordinated under the authority of the Church (church, monastery),[64] before the "punishing sword of secular law" for the time when he was under the protection of the Church would became its slave (in this sense rather servant) and performed necessary work for the entity providing him protection. Since asylum was provided only while a refugee resided on hallowed ground, no other disposition with the slave was applicable; once the Church sold or donated a slave and he left the hallowed ground, he could be executed.

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58 Tripartitum, I/108 §1.

59 Tripartitum, I/106.

60 Tripartitum, I/51.

61 St. Ladislaus, III/4. See closer LACLAVÍKOVÁ, M – ŠVECOVÁ, A.: Pramene práva na území Slovenska I. Trnava: Typi Universitatis Tyrnaviensis, 2007, s. 71.

62 Zakon sudnyj ľudem, cited according to: ŽIGO, P. – KUČERA, M.: *Na písme zostalo (dokumenty Veľkej Moravy)*. Bratislava: Perfect. 2012, p. 110. Compare with KOLÁRIK, J.: *Právne dejiny Slovenska. I. diel.* Bratislava: Eurokódex. 2010, p. 16. Compare also with LACLAVÍKOVÁ, M – ŠVECOVÁ, A.: Pramene práva na území Slovenska I. Trnava: Typi Universitatis Tyrnaviensis, 2007, s. 49.

63 *Capitulatio de partibus Saxoniae*: ..."*All agreed on the fact that the Christian churches, which are now being built in Saxony state and which are consecrated to God, enjoyed no lesser but more exquisite seriousness (respect) than pagan burial places enjoyed... If someone finds asylum in a church, let no one dare to expell him from the church by force, but let him live in peace until he is brought before the Court (Assembly) and for respect for God and the respect of the saints of the church, may his life be gifted to him (and guaranteed security) and all his limbs. Dispute then let be settled by him as can be done and as imposed by the judgment, and then let him be brought before the king, and he shall send him to where his Majesty wishes... However, if someone, due to these capital crimes committed secretly, fled voluntarily to the priest, and after pleading guilty he wanted to repent, let him be exempt from the death penalty, based on the testimony of the priest.*" BEŇA, J.: *Pramene k dejinám práva (stredovek)*. Bratislava: PRAF UK. 2007. p.53.

64 Providing asylum to the sacred land was common already in pre-Christian times. Almost all religions of antiquity knew and exercised sovereign rights over sacred ground. Known example of asylum infringem is an asylum in which was hidded Arsinoe, the sister of Cleopatra VII Ptolemaic Dynasty. As ordered by Cleopatra, Mark Antony´s soldiers dragged Arsinoe from the temple of the goddess Artemis at Ephesus, and killed her only when she was out of the temple. This fact provoked enormous outrage almost all over the known world: the indignation was caused not so much by the murder of a sister, but rather a violation of the right of asylum in the Temple of Artemis at Ephesus (one of the most sacred temples of antiquity).

Conclusion

In the title of this paper, we asked ourselves whether slavery existed in the area of present-day Slovakia. The answer to this question can be based on evidence and arguments acquired by numerous scientific disciplines, especially archeology, linguistics and law (or history of law). Archeology can not give us clear and direct evidence of the existence of slavery in this area. Linguistics is richer in this respect: through analysis of the origin of the terms *otrok* (slave) or *rab* (menial), which in many cases were demonstrably used in this area during the studied period, we can come to the conclusion that slavery existed as such. However, even on the basis of this knowledge learned through linguistics, we can not credibly prove what form the said slavery had, nor what the social and legal status of slaves was. Only through analysis of legal rules governing the legal status of slaves (using the terminology we analyzed in linguistic terms) it can be concluded that slavery existed in the area of present-day Slovakia in the studied period of state and law, and also that it had a specific form. Slavery in our history never acquired the character of slavery systems known from the ancient oriental despotisms or slave democracies, for slave labor was not the main means of production in our conditions. Slavery here was rather a patriarchal form of slavery[65] and created an intermediate transition to full feudal relations of production.

Súhrn
Termín „otrok" v práve ranofeudálneho štátu na území dnešného Slovenska

Počas obdobia ranofeudálneho štátu existujúceho na území dnešného Slovenska mala spoločnosť špecifickú sociálnu štruktúru. Vo všeobecnosti sa uvádza, že spoločnosť ranofeudálneho obdobia sa členila na vrstvu slobodných, poloslobodných a neslobodných. Termín „neslobodní" je však príliš všeobecný, a je možné do neho subsumovať viac konkrétnejších významov.

V tomto príspevku sa snažíme odpovedať na otázku, či v rámci spoločenskej vrstvy „neslobodných" existovali aj otroci. Existovalo teda otroctvo aj v dejinách nášho národa? Existovalo otroctvo počas ranofeudálneho štátu na našom území – v štáte veľkomoravskom a štáte uhorskom do prelomu dvanásteho a trinásteho storočia?

Prvá časť príspevku popisuje štruktúru spoločnosti tohto obdobia, druhá časť popisuje terminologické východiská pojmov označujúcich otrokov v ich najrôznejších podobách, aké sa v jednotlivých dobách slovenských právnych dejín používali (servi, rab, čeľaď, otrok etc.). Následne sú popisované jednotlivé formy otroctva existujúceho u nás v období vrcholného stredoveku, ako aj právne predpisy upravujúce právne postavenie otrokov, obchodovania či inej dispozície s nimi.

V úvode tohto príspevku sme si položili otázku, či v rámci spoločenskej štruktúry obyvateľstva žijúceho na území dnešného Slovenska existovali aj otroci a otroctvo ako také. Odpovedať na túto otázku možno na základe dôkazov a argumentov získaných viacerými vednými disciplínami: archeológie, jazykovedy a práva (resp. dejín práva). Archeológia nám nedala doposiaľ jednoznačné a priame dôkazy o existencii otroctva na našom území.

[65] Such a form of slavery existed in the Roman State in the early period of existence – in the period of the Roman Kingdom.

Jazykoveda je v tomto smere bohatšou: analýzou pôvodu termínov „otrok" či „rab", ktoré v mnohých prípadoch boli dokázateľne používané na našom území v skúmanom období možno rezultovať, že otroctvo ako také existovalo. Hoci boli skúmané dokumenty písané staroslovienčinou, teda jazykom pôvodu južnoslovanského, termíny „otrok" či „rab" boli dokázateľne používané aj v jazyku používanom obyvateľstvom žijúcim na území dnešného Slovenska v skúmanom období. (Ak teda jazyk domáceho obyvateľstva poznal termíny označujúce otrokov či otroctvo, je vysoko pravdepodobné, že otroctvo ako také existovať muselo).

Avšak ani v prípade takto získaných poznatkov (získaných na základe jazykovedy) nemôžeme hodnoverne dokázať, akú formu uvedené otroctvo malo a ani to, aké bolo spoločenské či právne postavenie otrokov. Až analýzou právnych noriem upravujúcich právne postavenie otrokov (používajúc terminológiu ktorú sme analyzovali z lingvistického hľadiska) možno vyvodiť záver, že otroctvo na území dnešného Slovenska v sledovanom období štátu a práva existovalo, ale aj to, akú malo podobu. Otroctvo v našich dejinách nikdy nenadobudlo charakter otrokárskeho systému známeho zo starovekých orientálnych despocií alebo otrokárskych demokracií – otrocká pracovná sila nebola v našich pomeroch hlavným výrobným prostriedkom. Otroctvo v podmienkach existencie ranofeudálneho štátu na území dnešného Slovenska malo skôr charakter patriarchálneho otroctva a tvorilo len medzistupeň prechodu k úplným feudálnym výrobným vzťahom.

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Maroš Piľa[1]

The Socialist concept of land ownership in Czechoslovakia

Abstract: The main topic of this paper is land legislation development since the creation of the Czechoslovak Republic, with emphasis on the period 1945 – 1964 which was dominated by the idea of Socialist (collective) ownership. The purpose is to bring attention to bear on the land ownership conditions which gave rise to property enjoyment rights and duties, whose development was determined by the post-war regime of people's democracy soon after liberation in May 1945. The Socialist Constitution (adopted in 1960) as the fundamental law is considered as a framework for ownership defining its basic kinds and forms, while new forms of ownership were later broadened by civil and commercial law (both adopted in 1964). This paper's objective is not only to define the legal basis of Socialist Czechoslovakia from today's perception of values embedded in law, but also to touch upon its teleological values. In regard to land legislation the introductory part focuses on the object of land ownership, *i.e.* land and its importance, as well as dealing with the status of land law in its historical context, since it was considered a sub-branch of Socialist law.

Key words: land, ownership, ownership relations, Czechoslovak Republic, land reform, the Constitution of the Czechoslovak Socialist Republic, civil/commercial code.

1. Land as an object of ownership

Land is an object of ownership, and has no less significance in today's world than it had in the past due to its socio-economic importance, which lies in its irreplaceability. Land as the upper part of the Earth's surface (lithosphere)[2] is specified by its singularities differing from other (utility) goods and therefore determining social relations which are denoted as ties with the land.

Land as the platform for all human activities, either production or non-production output, in agriculture and forestry, has poly-functional character and is indisapensble for economic and other social activities, even without the possibility of effectively increasing the land mass. Not least land is the basic element of the environment, and is the source of mineral resources and water. Quality of land is partially determined by human activities and therefore is an appropriate subject of state protection. Land ownership has been important for people and society since the beginning of mankind, as well as land being crucial for life as a source of food.

Land law considers land as the object of social relations, and indispensable for any economic and social relations.[3] This definition needs to be narrowed down, to sort out the economic issues which actually relate to land but do not represent directownership. Land ownership is not considered as a legal issue dealing with state sovereignty or norms on administrative divisions, even though it relates to land as the territory of a state. Land ownership is described in state law and public international law/administrative law respectively. However, not necessarily every social interaction with land involves land ownership.

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1 JUDr. Maroš Piľa, MPA, (Trnava)

2 Legal norms related to the Earth's surface use various terms. The term "soil" is narrowed in some legal norms to agricultural soil, forest soil etc., which identifies parts of the Earth's surface and is therefore used specifically. Additionally the expressions soil fund or land fund are used, which denote that the land is used for a certain purpose or is in possession of a certain person.

3 DROBNÍK, J.: *Základy pozemkového práva*. 3. aktualizované doplnené vydanie. Praha: Eva Rozkotová, 2010, p. 10

Land ownership is a set of economic relations whose rules are determined by the state and its legislative function. State administration basically comprises legislative, planning and organizational roles. The legislative function of the state is a kind of tool enabling regulation of land ownership, determining its content, subjects, protection, creation and cessation of subjective rights.

Land ownership is considered as a set of mingled rights, because some of them show private legal status and some public legal status.[4] The scheme of land ownership, as well as land law, is changeable in line with the social development of society. Legal regulation of land ownership has developed within the so-called classical branches of law, especially civil law,[5] which lays down the current legal regulation of land ownership, which is encompassed in the Civil Code.[6] Since land law is considered as part of other branches of law, it can be designated as a multi-disciplinary branch of law.

In the countries of real Socialism[7] according to the Soviet Union model, including the post-war Czechoslovak Republic and later the Czechoslovak Socialist Republic (hereinafter CSR, CSSR respectively), land law was formed as an independent branch of law. In 1989 the social system changed, and new political and economic systems meant a return to classical principles of private ownership and its forms. The most important issue among property rights[8] and relations as objective rights which are regulated by civil norms is ownership, which has to be understood as an economic category, ownership rights as a legal category, and ownership relations as a category of social relations.[9]

Current discussions are not focused any more on the issue of whether land law can be considered as an independent branch of law or not. The current issue is that in land ownership importance is placed on the object, upon land,[10] because existing land law norms regulating land ownership, as well as the regulatory tools used, makes them different from other parts of law. Land therefore as *res sui generis* specifically influences social behaviour.

The legal definition of land law stems from its subject, i.e. certain specific relations which are regulated by land law. Considering the criteria and features defining land ownership, the definition of land law can be expressed as follows: land law represents certain legal norms which regulate the legal relations between people and land as an object of law, with regard to exploitation and protection of land. The purpose of it is to ensure sustainable development of a state along with optimal satisfaction of the interests of society and land owners. Of course this definition we have come up with is not universal, and also it was

4 Dualism theory of continental lagal system (D. Ulpianus) is nowadays considered outlived. See: LAZAR, J. et al.: *Občianske právo hmotné*, časť prvá, Bratislava: Iura Edition, 2006, pp. 11 – 12.

5 PEKÁREK, M., PRŮCHOVÁ, I.: *Pozemkové právo*. Brno: Masarykova univerzita v Brně, 2004, p. 16

6 ŠTEFANOVIČ, M.: *Pozemkové právo*, Bratislava: Eurounioun, 2010, p. 35

7 The term used for Eastern block countries (USSR and its allies) with reference to the Soviet-type economic planning enforced by the ruling Communist Party (narrow definition). The term was used to differentiate between existing political regimes and theories of ideal Socialism.

8 The definition of property and property rights is not laid down in the Slovak legal order, although the term "other property rights" is defined in Article 113 of Law No. 233/1995 Coll. on court distrainers and distraint as follows: evaluability, alienability and should not belong to a certain entity.

9 See: ŠVIDROŇ, J.: Alternatívny pohľad na „súkromné" právo po dvadsiatich rokoch prác na novej kodifikácii občianskeho práva v Slovenskej republike. In.: *Sborník příspěvků z konference 2010,* pp. 1029 – 1039

10 From the point of view of legal terminology the author considers the abstract term "land" more suitable than the term "soil", since the latter is mainly used in natural sciences (e.g. geology, geography). The research subject of land jurisprudence is neither soil nor its compound or nature. The conceptual feature of land is the specific identification of certain parts of the Earth's surface, mainly delimited by natural or artificial borders in a certain area with respect to its location, acreage and owner/keeper.

not the purpose of this study, since certain specifics such as the systematics of law are not taken into account. If they are brought into the equation, then land law can be defined as a legal branch coming out of the so-called horizontal division of legal relations where land is a common object (non-direct object).[11]

2. Development of land regulations in Slovakia in the period 1918 – 1948

2.1 Land legislation during the first Czechoslovak Republic

After the dissolution of the Austro-Hungarian empire, in the newly-created Czechoslovakia there was legal continuity based on the Law on Creation of the Independent Czechoslovak State, October 28, 1918 (No. 11) This was the Reception norm[12] which adopted *en bloc* all Austro-Hungarian legal norms.[13] This law was not only the reception norm which set up legal dualism, but in particular it proclaimed Czecho-Slovak state souverenity. In the territory of Bohemia, Moravia and Silesia the Austrian legal order remained in force (the Hlucin district kept German legal order in force), and in the territory of Slovakia and Ruthenia the Hungarian legal order remained in force.[14] With the formation of the new state, however, the Czechoslovak Republic as a subject of international law, the new legal order of the Republic was also created.[15] State interference with ownership rights[16] was carried out in connection with preparations for a new land reform, which was the result of social, economic as well as political needs in order to remove the relics of feudalism. The new land reform[17] was implemented through the legal norms adopted between 1918 – 1920.

Among the first measures of the Constituent National Assembly was adoption of the Law Concerning the Limitation of Disposition of Great Landed Property, November 9, 1918 (No. 32). However this was not a focal norm or initial norm, as its purpose was to prevent any actions which could block preparations for the land reform. The legislators banned any appropriation or mortgage of land property listed in the Land Registry , except those cases in which prior consent was given by the Department of Agriculture. A similar legal regulation was encompassed in the Law on Exceptional and Extraordinary Measures

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11 DROBNÍK, J.: *Základy pozemkového práva*. p. 5

12 See: LACLAVÍKOVÁ, M.: The legal history of Slovakia as part of the Czechoslovak Republic 1918 – 1938 In: Modernisierung durch Transfer zwischen den Weltkriegen / herausgegeben Tomasz Giaro. – Frankfurt am Main: Vittorio Klostermann, 2007. pp. 233 – 241

13 Article II of the Reception norm should be interpreted in the light of the constitutional law which established the Constitution of the Czechoslovak Republic, February 29, 1920 (No. 121). Article IX contained the derogation of the Reception norm, with a reservation which invalidates all those norms contradictory to the democratic system of the new state. See: MOSNÝ P., LACLAVÍKOVÁ, M.: *History of the State and Law on the Territory of Slovakia II. (1848 – 1948)*. Kraków: Towarzystwo Slowaków w Polsce, 2014. pp. 54 – 56, MOSNÝ P., HUBENÁK, L.: Dejiny štátu a práva na Slovensku. Košice: Aprilla, s. r. o., 2008. pp. 173 – 174 and MOSNÝ P., LACLAVÍKOVÁ, M.: *Dejiny štátu a práva na území Slovenska II. (1848 – 1948).* Kraków: Towarzystwo Slowaków w Polsce. 2014. p. 47

14 See p. 113: LACLAVÍKOVÁ, M.: Snahy o kodifikáciu a unifikáciu súkromného práva v Československu a Poľsku (1918 – 1938) In: *Polska I spoleczeństvo w 21 wieku: państvo i pravo w 21 wieku – szanse I zagrożenia / pod redakcja Barbary Stoczewskiej*. – Kraków: Krakowskie Towarzystwo Edukacijne sp. z.o.o., 2004. pp. 109 – 160

15 The Ministry for Unification of Legislation and State Administration was in charge of unification and codification of civil law along with the Ministry of Justice.

16 See: HORÁK, O.: První čs. republika a ochrana vlastnictví. In: *Právník*, 2007, roč. 146, č. 2, pp. 1 – 14

17 See: HORÁČEK, C.: *Pozemková reforma*. Brno: Barvič & Novotný, 1922

Taken in the Territory of Slovakia, December 10, 1918 (No. 64)[18], which also banned appropriation of land property. These legal measures were taken by the Czechoslovak legislators as a result of lack of political consensus which therefore *de iure* banned free disposition with land in the name of the planned land reform. In spite of that, land owners could fully enjoy the benefits arising from their ownership.

Agrarians were basically in charge of the land reform, and in the beginning an important role was also played by the Social Democrats, who had a different view on how the reform should be carried out. Disparities between them were caused by the issue of how the reform should be carried out. Within the Social Democratic party there were discrepancies too. The radical wing inspired by Soviet Russia insisted that large estates should be turned into agricultural cooperatives, since they believed that large-scale production could not be compared to inefficient small-scale rural farmers in output production, whereas the moderate wing upheld repartitioning of great land property. A compromise was achieved at the end of December in 1918 during the XII Congress of the Social Democratic Party, where the delegates agreed upon urgent expropriation of great land property *ipso lege*, as well as agreeing on a policy not to let great land property to be partitioned, but to keep it as state property.[19] The Agrarian Party proposed that the Constituent National Assembly create a 24-member commission whose task would be to ascertain which large estates could be divided into independent farms. The Party promoted partition of large estates in favour of small-holders, cottagers and those who had no land, and for all legionaries.[20] This pragmatic approach was due to fact that the party was about to defend its political position as the largest parliamentary party in the upcoming parliamentary elections, and wanted to stay ahead of the other political parties.

By the end of March 1919 a 32-member committee of the National Assembly was elected, whose duty within a short period of time[21] was to frame the land reform bill. The Committee was hampered by the fact that throughout the political spectrum there was disunity on how the land reform should be carried out, and especially on the question of the extent of expropriation. One example that can mentioned were the Socialists, who demanded expropriation *ipso lege*, which was rejected by the National Democrats due to contradiction with ideas of private law. For these reasons the politicians turned to university professor Dr. Krčmář, who proposed the brand-new term "zábor"[22] for expropriation, and offered a definition of it in which each party found its own meaning.[23] This new concept of expropriation allowed the Land Office not only to carry out expropriation but also in

[18] See article 4; an identical definition can be found in the Law Concerning the Limitation of Disposition of Great Landed Property, November 9, 1918 (No. 32). For Slovakia as an administrative part of the new state another Ministry was established with full administrative authority over Slovakia.
Compare: GÁBRIŠ, T.: Právne vyjadrenie hodnôt novovytvorenej ČSR (1918) *In: Dny práva – 2008 – Days of Law. – Brno: Masarykova. univerzita,* 2008, p. 440 (see. footnote). Retrieved May 8, 2014 <http://www.law.muni.cz/sborniky/dp08/files/pdf/historie/gabris.pdf>

[19] TEXTOR, L. E.: *Land reform in Czechoslovakia*. London: George Allen & Unwin Ltd. 1923, pp. 22 – 23. See: KUKLÍK, J.: *Znárodněné Československo*. Auditorium, Praha, 2010. pp. 37 – 38.

[20] TEXTOR, L. E.: *Land reform in Czechoslovakia*. pp. 24 – 25.

[21] According polical newspaper Venkov dated March 27, 1919 Commision was obliged to present the proposal within 8 days. Source: TEXTOR, L. E.: *Land reform in Czechoslovakia*. p. 28, footnote no. 3.

[22] The bill read: "the estates are zabrány", which can be literally translated as "taken".

[23] Rapporteur of the land committee F. Modráček, a member of the Social Democrats, expressed his gratitude during the plenary sesion of the Constituent National Assembly as follows "We are most grateful to Professor Krčmář, who had a fortunate idea for a word which meets all demands." (PEROUTKA, F.: *Budování státu: Rok 1919*, díl 2, část první. Praha: Fr. Borovský, 1934, pp. 866 – 867).

certain cases not to do so, which was the intended purpose. The term is therefore primarily related to the classical meaning of expropriation.[24]

Political consensus upon the basic principles of land reform led to the adoption of the Law Providing for Expropriation of April 16, 1919 (No. 215). This Law should be interpreted together with the Law Constituting Regulation on Allotment of Expropriated Land and Regulating Legal Relations to Allotted Land (the Law of Allotment) of February 17, 1920 (No. 81) and the Law Concerning the Taking Over and Compensation for Expropriated Estates of April 8, 1920 (No. 329). Those three laws are considered as the basic legal regulation of the so-called First Land Reform.

As an enabling act the Law of April 16, 1919 did not expropriate large estate owners but limited their power of disposition with large estate property, and if called upon they had to surrender it to the Government. The state was therefore authorized to distribute expropriated land to small-holders in exchange for compensation. Large estate owners retained possession of their large estates until a decision was made by the Land Office. Hence large estates did not cease to exist *ex lege* and the state was not required to take over such property. Regarding compensation the Law referred to the future act, but ruled out certain subjects *e.g.* former royal family members, who were not eligible for compensation.[25] The Law represented the ideological basis of the land reform which enabled expropriation of large estates *pro futuro*. Due to the social pressures on small-holders it was necessary to take certain steps which led to adoption of the Law on Expropriation of Land for Small-scale Tenants of June 26, 1919 (No. 318). Small-holders who held property in long-term tenancy from October 1, 1901 were entitled to buy land not exceeding 8 hectares, or to extend their tenancy under conditions set by the Law. The exception was agricultural land in urban residential areas. Compensation was based upon 1913 prices, and the new Czechoslovak crown was considered the equivalent of the Austro-Hungarian crown. Prices were set upon the decision of the district court, but in practice it was often agreed upon by the seller and buyer.[26] This was the first law which provided land for peasants.

Another issue which the Constituent National Assembly had to tackle was the creation of an agency which could carry out the land reform. Some believed that this task could be performed by the Ministry of Agriculture, while others preferred the creation of an independent body. The Law Concerning the Land Office of June 11, 1919 (No. 330) set up an independent body headquartered in Prague, which commenced its work on October 6, 1919. The board consisted of a President and two Vice-presidents, and the Land Office was answerable to the Cabinet. The Land Office acted on behalf of the state in all cases arising from the Law of April 16, 1919 concerning third parties, courts and agencies.[27] The Land Office exercised great power, and based on its discretionary authority it could exempt any large estate up to 500 hectares or even several thousand hectares for any reason. The law of June 11, 1919 did not specify any time restrictions when large estate property should be ceded. Quite often it happened that the Land Office exempted property from expropriation, which was later subject of criticism. The Land Office ceased to exist on May 1, 1935 and its powers were delegated to the Ministry of Agriculture.[28]

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[24] See: KREJČÍ, D.: Některá pochybná ustanovení zákona záborového. In: *Časopis pro právní a státní vědu*, 1921, roč. 4, s. 1 – 16 and HOETZEL, J.: *Československé správní právo, část všeobecná*. Praha: Melantrich, a.s., 1937, pp. 303 – 305.

[25] See article 9 *in fine* of the Law.

[26] TEXTOR, L. E.: *Land reform in Czechoslovakia*, p. 41

[27] HOETZEL, J.: *Československé správní právo, část všeobecná*. pp. 143 – 144.

[28] The Government decree abolishing the Land Office (State Land Office) of January 21, 1935 (no. 22) and its authority was endorsed by the Ministry of Agriculture.

Based on the Law Constituting Regulation on Allotment of Expropriated Land and Regulating Legal Relations to Allotted Land (the Law of Allotment) of February 17, 1920 (No. 81), previously expropriated land was *de facto* distributed, if the state did not keep the land for its own purposes through the already-created Land Office, in favour of individuals (small-holders, cottagers, those who had no land at all, and legionaries[29]), associations of private persons and legal entities, for housing purposes, scientific or general public purposes. Agricultural land distributed to private persons (small-holders) depended on its quality in the extent from 6 to 9 hectares, but in any case not exceeding 15 hectares. Afterwards another law was adopted laying down Amended Regulations on Legal Rights to Allotted Land (Small Allottment Law) of May 27, 1931 (No. 93), which extended the Law of February 17, 1920 dealing with new rights to land near watercourses and roads to ease its management.

After adoption of the Law of April 16, 1919 limiting owners' rights, subsequent adoption of a law compensating expropriated large estates was expected. Nearly a year elapsed after the Law Concerning the Taking Over and Compensation of Expropriated Estates, April 8, 1920 (No. 329) was adopted, which regulated compensation for expropriated land estates. Monetary compensation was based upon average market prices during the period 1913 – 1915 inclusive for land exceeding 100 hectares in extent, whereby the monetary issue was settled through the decision that the Czechoslovak crown equalled the Austro-Hungarian crown. Such calculations met with outrage from large estate owners, since a different calculation applied to land which was not subject to expropriation.

Compensatory provisions of the Law of April 8, 1920 compared to the Law on Capital Levy and Accrued Property Taxes, April 8, 1920 (No. 309) did not reflect market prices. The so-called Brdlík Table, an annex to the Law of April 8, 1920, determined compensation which was based on a 75 per cent increase in land value from 1914. Such an obvious application of double standards was excused on the basis of the concept that compensation for expropriated large estates should not exceed the price for the other lands. Members of the National Assembly believed that justice could be served only if the difference between expropriated lands and other lands was kept.[30] The Law of April 8, 1920 was amended[31] several times, and several governmental decrees were published as well.

The way the land reform was carried out in Czechoslovakia can be legally described as regular expropriation of large estates, despite the "invention" of the new term "zábor". In a short time the (Constituent) National Assembly was confronted with a difficult task whose execution was sensitive due to the fact that expropriation mostly hit the former Hungarian and German aristocracy, which was by that time a minority in Czechoslovakia. Dr. Viškovský, President of the Land Office, acknowledged in 1922 that the purpose of the land reform was *"a matter of political payback for the Battle of White Mountain"*.[32] The land reform was not only about expropriation but also dealt in some cases with confiscation of property of the Habsburg-Lothringen dynasty[33] and other enemies and peer foundations.

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29 See: Government decree on Allotment of Land to Legionaries and to War Invalids, April 6, 1922 (no. 117).

30 TEXTOR, L. E.: *Land reform in Czechoslovakia*. pp. 100 – 101.

31 The Law Which Regulates Temporary Provisions of the Law Concerning the Taking Over and the Compensation of Expropriated Estates, April 8, 1920 (No. 329) in the case of take over and compensation for a single parcel of land or part of it due to expropriation of land property, February 17, 1922 (no.77). Law which amends the Law Concerning the Taking Over and the Compensation of Expropriated Estates, April 8, 1920 (No. 329), July 13, 1922 (no 220)

32 PEROUTKA, F.: *Budování státu: Rok 1919*, 2. díl, část první. p. 867.

33 Beside exception in article 208 of Saintgerman Peace Treaty.

The main purpose of the land reform in Czechoslovakia, later known as the First Land Reform, was to enable the Czechoslovak citizens who worked the land for their own purposes to acquire small properties, and it also involved nationalization of large estates (e.g. forests).[34] As a result there was an increase in numbers of land owners[35], which paved the way for capitalism into agriculture, even though the initial goals of the land reform were not fully achieved. The reform was mostly a setback for small-holders and those who did not have any land, because they could not afford to buy land even though favourable legislation was enacted. Due to many exemptions given by the Land Office, elimination of large estate property was not fully carried out, and the question of remnant property emerged as well.

It should not be overlooked that the land reform in Czechoslovakia was inevitable, as it was in the neighbouring countries of Poland, Hungary and Romania, and other European countries after the end of the First World War. On the one hand large estate owners and on the other hand small-holders, cottagers and those who had no land at all were significant differences and therefore the *status quo* was not bearable. Due to partitioning of large estates a new problem of so-called remnant estates emerged, which was dealt with in the next, the Second Land Reform.

Mentioning the land reform it cannot be overlooked that during the period of the Slovak State (1939 – 1945) the government deliberately interfered with land ownership rights. Having taken into consideration the subject of this topic itself, it would be appropriate to summarise that the ruling state party known as Hlinka's Slovak People's Party (Hlinkova Slovenská ľudová strana) authorized the State Land Office (Štátny pozemkový úrad) which was entitled to revise decisions made during the land reform based on Law no. 40/1940 Coll. on Land Reform. The Law on Land Reform authorized state intervention into private ownership of a certain category of people based on racial legislation.[36]

2.2 Governmental program of the National Front of Czechs and Slovaks

In liberated territory in Košice on May 5, 1945 the first post-war government of the National Front of Czechs and Slovaks adopted a political program which was firstly discussed during March 1945 in Moscow. The program brought political, economic and social changes and shaped the people's democracy regime, which meant social re-building of the Czechoslovak Republic.[37] It is widely known as the Košice Government Program *(Košický vládny program)*, and it encompassed the main principles of domestic as well as foreign policy. This government program was also called the program of "national and democratic" revolution.

The question of nationalization or confiscation of private property (immovables, i.e. buildings and lands) was not covered in detail by the Košice Government Program, however regarding land it states that the government: *"Meeting the demands of Czech and Slovak peasants and lacklanders after careful accomplishment of new land reform and led by efforts to prise Czech and Slovak land from foreign German-Hungarian aristocratic hands[38] once and for*

[34] FAJNOR, V., ZÁTURECKÝ, A.: *Nástin súkromného práva platného na Slovensku a Podkarpatskej Rusi*. III. vydanie pôvodného diela. Bratislava: Heuréka, 1998, p. 98.

[35] See: PEROUTKA, F.: *Budování státu: Rok 1919*, 2. díl, část druhá. Praha: Fr. Borovský, 1934, p. 886.

[36] See: BAKA, I.: *Politický systém a režim Slovenskej republiky v rokoch 1939 – 1940*. Bratislava: Vojenský historický ústav, 2010, p. 106.

[37] See: KNAPP, V.: *Vlastnictví v lidové demokracii. Právní úprava vlastnictví v Čs. republice*. Praha: Orbis, 1952.

[38] See: p. 380. ŠVECOVÁ A., MINÁRIKOVÁ, S.: K problému realizácie zákonodarstva obnovenej ČSR v procese "zoštátnenie" majetku rodiny Pálfi – Červený kameň In: *Pocta Stanislavu Balíkovi k 80. narozeninám. Acta*

all, as well as from the hands of traitors of our nation, and give the land back to the Czech and Slovak peasantry (Slovak and Ukrainian cottagers – M. P.) *and lacklanders – The Government welcomes land confiscation from enemies and traitors which is carried out by Slovak National Council and its partitioning among ordinary agricultural people."*[39]

On the basis of ordinances enacted by the Slovak National Council, as well as through the Presidential decrees[40] known as the Beneš Decrees which were promulgated even before the Constituent National Assembly was convened, the Czechoslovak legislators interfered with ownership relations. Certain categories of persons were affected by confiscation of property. Beside Germans and Hungarians the Presidential Decrees[41] also covered persons who had acted against the Czechoslovak state and were therefore labelled as traitors or collaborators. Those persons who proved beyond reasonable doubt their loyalty to the Czechoslovak state by moving proactively against the threat were exempted from confiscation, but on the other hand the property which belonged to traitors or collaborators was confiscated and administered by the state. Thus owners' property rights were limited; within Slovakia this was maintained through Ordinance no. 50/1945 Coll. adopted by the Slovak National Council, and it proceeded with Presidential Decree no. 5/1945 Coll., which was valid within Czech lands only.[42]

For the territory of Slovakia Ordinance no. 4/1945 Coll. on Confiscation and immediate partition of agricultural land belonging to Germans, Hungarians and also Traitors and Enemies of the Slovak Nation came into force.[43] Confiscated land was transferred to the possession of private persons or organisations without any compensation to the former owners. For the category of people belonging to Hungarian nationality the limit of 50 hectares of agricultural land was set as the sole exception. This answers to the legal regulation issued by the Slovak National Council in comparison with Presidential Decree no. 12/1945 Coll., which did not set any limit. Both acts reflected national specifics.

historico-iuridica Pilsnensia 2008. (ed.) Vilém Knoll. – Plzeň. 2008. pp. 377 – 393.

39 Kapitola XI, Program vlády Národného frontu Čechov a Slovákov. Source: *Košický vládny program*, Pravda, 1978, Bratislava, pp. 108 – 109.

40 Specifically four Presidential decrees are relevant here, of which two were valid for the territory of Slovakia. The Decree of the President on the day May 19, 1945 no. 5/1945 Coll. concerning the invalidity of some transactions involving property rights from the time of loss of freedom and concerning the National Administration of property assets of Germans, Hungarians, traitors and collaborators and of certain organizations and associations; the Decree of the President on the day June 21, 1945 no. 12/1945 Coll. concerning the confiscation and expedited allotment of agricultural property of Germans and Hungarians, as well as traitors and enemies of the Czech and Slovak nation – valid exclusively within Czech lands; the Decree of the President on the day July 20, 1945 no. 28/1945 Coll. concerning the settlement of Czech, Slovak or other Slavic farmers on the agricultural land of Germans, Hungarians and other enemies of the state – valid exclusively within the Czech lands; the Decree of the President on the day October 25, 1945 no. 108/1945 Coll. concerning the confiscation of enemy property and on the Fund for National Restoration.

41 Presidential Decrees could be valid within the territory of Slovakia only with prior consent of the Slovak National Committee chairmanship with the earliest possible date starting from April 21, 1945 i.e. when the Ordinance of Slovak National Committee no. 30/1945 Coll. on Legislative Authority over Slovakia came into force. Ordinances issued by the Committee were equivalent to laws. Presidential Decrees are an inherent part of Czecho-Slovak legal order since retroactive ratification of Law no. 57/1946 Coll. which Approves and Declares Presidential Decrees to be Laws. See: BEŇA, J.: *Slovensko a Benešove dekréty*. Bratislava: Belimex, 2002.

42 See: Article 7 of the Presidential Decree or article 5 of the Ordinance. Agricultural property could be granted to the ownership of small peasant, agricultural families up to a certain size. In addition to this the Presidential Decree allowed the allotment of property to municipalities, administrative regions and cooperatives. Both laws took into account national specifics.

43 The Ordinance was repealed and replaced by Ordinance of the Slovak National Council no. 104/1945 Coll. concerning the confiscation and expedited allotment of agricultural property of Germans and Hungarians, as well as traitors and enemies of the Slovak nation.

Another group of Presidential Decrees which interfered with property rights were decrees on nationalization (or socialization). Calls for nationalisation of key parts of industry had been raised by London exile members, in the domestic resistance movement[44] as well as by Moscow exile members. Nationalisation was carried out through a series of Presidential Decrees from no. 100/1945 Coll. to 103/1945 Coll., which were enacted on October 24, 1945, which initially became Nationalisation Day.[45] The state became owner of nationalised enterprises, essentially in exchange for compensation.[46] An integral part of nationalised enterprises were the adjacent lands. In a narrow sense nationalisation in Czechoslovakia can be considered as socialization of key parts of industry, private banks and insurance houses.

The Kosice Governmental Program did not omit the question of property restitution for those people whose property was confiscated during World War II on the basis of national, political or racial persecution. Restitution was granted on the basis of Presidential Decree dated May 19, 1945 no. 5/1945 Coll. on the Invalidity of some property transfers during the Dark Age and on national administration of assets of Germans, Hungarians and collaborators and some organisations and foundations. The Presidential Decrees fulfilled the political part of the Kosice Governmental Program regarding retributional regulation, which also had confiscating and expatriating functions. This can therefore be considered as the first stage of new land reform, during which the private ownership of land by those persons who were national and political foes was eliminated.

2.3 Revision of the Land Reform

Soon after confiscation and repartitioning of Hungarian and German land property in 1945, the second stage of the new land reform in 1946 – 1948 was launched, and it was related to three areas. The first area was revision of the land reform which was carried out during the existence of first Czechoslovak republic, while the second area covered preparation for the new land reform, and the third covered Unified Agricultural Cooperatives. Legislation covering those areas is known as the Duriš Laws, which were named after the Minister of Agriculture and represented six legal acts which were adopted during 1947. The Ďuriš Laws were adopted under significant pressure on Parliament from workers' groups.

An important aspect was firstly to gain universal support from the small-holders, which was demonstrated during a rally of thousands of small-holders based on which the so-called Program from Hradec was adopted on April 4, 1947. The program among other issues dealt with land ownership and its distribution, and set the slogan *"Land belongs to those who work it"*.[47] However the program was not put into practice until the after *coup d'état* in February 1948.[48]

The most notable piece of legislation was Law no. 142/1947 Coll. on Revision of Land Reform, which triggered most discussion about this topic. The law completed the liquidation

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44 KUKLÍK, J. et al. *Vývoj československého práva 1945 – 1989*. Linde, Praha 2008, p. 35.

45 Independence day of the Czechoslovak republic, October 28, 1918, was celebrated due to political reasons from 1952 to 1989 as Bank Nationalisation Day (see: Law no. 93/1951 Coll. on Bank Holidays, Public Holidays, Commemorative and Notable Days; due to its amendment by Law no 56/1975 Coll. it was celebrated from 1976 onwards as a notable day without a day off work).

46 LHOTA, V.: *Znárodnění v Československu 1945 – 1948*. Praha: Nakladatelství Svoboda, 1987, pp. 146 – 151.

47 The political principle arising from Article XII sec. 1 of the Constitution of May 9 and Article 1 sec. 1 *in fine* of Law no. 46/1948 Coll. on New Land Reform (on permanent ownership regulation of agricultural land and timberland).

48 KUKLÍK, J. et al.: *Vývoj československého práva 1945 – 1989*. p. 82.

of large estates as well as remnant land property[49] as remains of the previous land reform. The purpose was to revise decisions and actions of the Land Office and later the Ministry of Agriculture, which were issued on the basis of the Law Providing for Expropriation, April 16, 1919 (No. 215) and related to it the legislation in issues enumeratively defined.[50] Excluded from this revision was land property belonging to the state, local government, united agricultural cooperatives, as well as land confiscated or nationalized on the basis of the Presidential Decrees.

To meet the purpose of the law a complete inventory of land was made and then put under revision, and the obligation was set to record the land in a special register called the Land Record Book. This obligation was put on owners or lessees, or given to national administration. In charge of this task was the Committee under the Ministry of Agriculture, and in Slovakia it was a special body called the Commission for Agriculture and Land Reform. The final phase of land reform revision was allotment of land property, essentially in exchange for compensation which took into consideration soil quality, its location and the purpose of allotment. Government decree no. 1/1948 Coll. was issued with regard to the Law on Revision of Land Reform, which set rules for allotment proceedings and definitions of annotations. Late adoption of this decree led to most revisions being carried out after February 1948. Compensation was based upon the Law Concerning the Taking Over and the Compensation of Expropriated Estates, April 8, 1920 (No. 329), adopted during the first Czechoslovak Republic, while administrative proceeding were subject to the norms of the Law Providing for Expropriation, April 16, 1919 (No. 215), with the exception of proceedings of allotment. In particular it has to be pointed out that forestry land was administered by different legal regulation, and was exclusively granted to the state, municipalities or local government or even to forestry cooperatives and in exceptional cases to individuals.

3. Legal development of land ownership in the period 1948 – 1964

3.1 February 1948 and the Second Land Reform

The final third stage of the New Land Reform was carried out after the *coup d'état* in February 1948. During the post-war period the constitutional framework was formally based on the Czechoslovak Constitution of 1920, although it has to be pointed out that the legal environment was significantly changed either by the Presidential Decrees of President Beneš, Ordinances enacted by the Slovak National Council, and not least by legislative initiatives of the Legislative Committee of the Slovak National Council.

During the plenary session of the Constitutional National Assembly held on March 21, 1948, the head of government Klement Gottwald proposed a New Land Reform program which set a maximum limit of 50 hectares for private ownership. The very same day several more laws on agriculture were adopted, thus fulfilling the Program from Hradec. The reform was launched via Law no. 46/1948 Coll. on New Land Reform (on permanent ownership regulation of agricultural and forestry land) and concerned two groups of landowners:

[49] Remnant property from the previous land reform was supposed to be taken over after the needs of small-holders, corporate entities and the state were satisfied. The take-over of this property was carried out by the Ministry of Agriculture and in nature it became state property and was not the subject of redistribution of allotment.

[50] See Article 1 of Law no. 142/1947 Coll. on Revision of Land Reform.

farmers owning over 50 hectares of land and all tenant farmers (regardless of land area). The state was obliged to buy the land, i.e. it was expropriated in exchange for compensation. In the sense of the Program from Hradec the land was purchased regardless of its area, if the owner did not work it or it was owned by a corporate entity. In the latter case the owner was eligible for up to 1 hectare. The law allowed several exemptions as well. In some cases it was possible to impose national administration upon the lands which were the subject of purchase in the sense of Presidential Decree no. 5/1945 Coll. on Invalidity of some Property Transfers during the Dark Age and on National Administration of the assets of Germans, Hungarians and Collaborators and some Organisations and Foundations. Purchased land was administered by the National Land Foundation until the time it was handed over to the new owner. Such land was allotted on the principles stipulated in the Law, whereby the fulfilment of conditions was similarly regulated as in the Law on Revision of Land Reform.

The Law limited new owners in their treatment of the land, which basicly meant that they had to personally work it. Law no. 90/1947 Coll. imposed an obligation on owners to register their land with a special registry (the Land Record Book), as well as allowing direct transfer of land property from seller to buyer. In this period the land registry system was disrupted on the grounds of cancelling the intabulation principle by the new Civil Code from 1950.[51] Later on it was discovered that this decision was counter-productive due to its opacity, and therefore after land catalogisation in 1955 on the basis of government decree the common records of land were re-established. The data were used mainly for planning and managing purposes of agricultural large-scale production, and records were kept solely of agricultural and forestry land in rural areas.[52] Property in residential areas was left unrecorded until enactment of the Law on Records of Property in 1964, which established a state records system.[53] It has to be added that records of private lands used by the Unified Agricultural Cooperatives or by state companies, or in substitute usage by private persons, had a separate records system, i.e. no information which plots of land were exploited by Socialist organisations with reference to legal documents upon which the right of use was established.[54]

The new Constitution, also known as the Constitution of May 9, was adopted at Prague Castle as constitutional law no. 150/1948 Coll. on the Constitution of the Czechoslovak Republic. This displayed the ideology of the new regime with the constitutional principle of Socialist land law: *"Land belongs to those who work it"*. The Constitution formally established the main political and social changes made during 1945 – 1948, and set up a network of National Committees as well as local state authorities and administration (which terminated the existence of dual state administration) and confirmed Slovak national administrative bodies while limiting their original jurisdiction (an asymmetric model of state administration). The Constitution confirmed "revolutionary" ownership changes and in its eighth chapter (the Economic System) distinguished between state, communal and private ownership. National ownership was designated exclusive ownership by the state, whereas property which did not have all-state importance could be communal property.

During the parliamentary session preceding adoption of the Constitution of May 9, one Member of Parliament and representative of agriculture and land reform stated *"Private*

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51 Record to the Land Record Book could be performed only upon request of party to legal relation while the execution of the deed was charged. Record had declaratory consequences.

52 PECEŇ, P. et al.: *Pozemkové právo – I. (prehľad)*. Bratislava: TriPe Bratislava, 1995, p. 97.

53 Law no. 22/1964 Coll. on Real Estate Record came into force by april 1, 1964 along with new Civil Code. Delegated legislature – ordinance no. 23/1964 Coll. upon performing Law no. 22/1964 Coll. on Real Estate Record.

54 PECEŇ, P. et al.: *Pozemkové právo – I. (prehľad)*, p. 98.

property protection of land is not a novelty of our new constitution. What gains did small-holders have from private property protection in the past if land was mostly in the possession of large estate owners? From now on, since large estates have been distributed among lacklands and small-holders, the Constitution has been fulfilling its proper purpose. From now on the Constitution is not a constitution of the nobility, but it is a constitution for small and medium-sized farmers. At the moment in line with the needs of small and medium-sized farmers, private property of land is constitutionally limited in two ways. First, a maximum land area limit is set for individuals or co-owners or those who run a family business as whole up to 50 hectares, and second, land private property protection exists for those people who work it."[55]

The third stage of the New Land Reform was carried out continuously during 1949 – 1951.[56] Until 1950 all communal lands were in state hands, and the remaining property which was not covered by the Land Reform was managed via Ordinance no. 158/1959 Admin. Bulletin on Administration of Remaining Agricultural Property Acquired from Land Reforms.

The New Land Reform was accompanied by the beginning of collectivisation in Czechoslovakia, the purpose of which was Socialisation of production means via Unified Agricultural Cooperatives. The Cooperatives were established through Law no. 69/1949 Coll. on Unified Agricultural Cooperatives (Creation of Unified Agricultural Cooperatives) and also through Law no. 81/1949 Coll. of the Slovak National Council on Arrangement of Legal Relations on Pastures of Former Cooperative Members and Similar Estates. The existence of such estates as traditional juridical forms[57] remained in the Slovak legal subsystem (e.g. Law no. X/13 on Non-divisible Common Pastures) and therefore upon this legal arrangement they became the property of Unified Agricultural Cooperatives. The Law settled personal as well as property questions of these traditional property cooperatives in relation to the newly-created Unified Agricultural Cooperatives, this being the beginning of collectivisation in agriculture.[58]

In short, United Agricultural Cooperatives were created for the purpose of Socialist rebuilding of villages on the basis of Socialist large-scale agricultural production. The most wide-spread and most important form of land usage was therefore established as collective land-use right, whilst some private ownership was still granted (*a contrario* in the USSR all land was nationalized, and a similar form of usage known as land use rights of the kolkhoz was created). Although the Unified Agricultural Cooperatives did not compensate former land-owners for the use of their associated land, the owners enjoyed other benefits arising from it depending on the type of Unified Agricultural Cooperative (e.g. based on the work performed on the land, or the area of the land). Legal regulation of Unified Agricultural

[55] Excerpt from Dr. M. Falťan's speech to the Constitutional National Assembly on May 8, 1948. Retrieved May 8, 2014: <http://www.psp.cz/eknih/1946uns/stenprot/113schuz/s113006.htm>

[56] KUKLÍK, J.: *Znárodněné Československo*. Praha: Auditorium, 2010, p. 321.

[57] Description of the system of Socialist land ownership would be not complete if there was no mention of the previous feudal regulation regarding land property of former cooperative members (pastures and forests) typical for the territory of Slovakia in particular. Although the form of ownership was divided co-ownership, the land consisting of pastures and forests could be expropriated either partially or as a whole, but not physically divided. Such complicated legal relations did not serve the purpose of maintaining large-scale production in agriculture. Due to this fact the right of use to pastures was transferred to the Unified Agricultural Cooperatives, and the right of use to forests was transferred upon administrative decision either to state organizations or to Unified Agricultural Cooperatives, whereby the ownership right was retained. Members of former cooperatives retained ownership over their property and as a remedy were given certain advantages corresponding to their property share.

[58] BEŇA, J.: *Vývoj slovenského právneho poriadku*, p. 326.

Cooperatives was covered especially by the provisions of the Agricultural Law and partially by the provisions of the Land Law, whereby those provisions provided adequate protection to the collective land-use right against infringement.

The period after February 1948 saw the implementation of the second stage of nationalisation, which amended several laws dealing with nationalisation in 1945 as well as new laws dealing with small and middle-sized companies, foreign trade and licensed businesses. Legal regulation was similar to that dating from 1945. It can be concluded that in Czechoslovakia by the end of the year 1948 there were no more private companies which had more than 20 employees.[59] New "revolutionary" ownership changes were mirrored in the new legislation of the Civil Code, which was prepared during the so-called "biennial legal plan" (1949 – 1950) focused on codification of the penal and civil codes. Law no. 141/1950 Coll., the Civil Code, extended the constitutional principle from the Constitution of May 9 into property rights, as well as unifying the legal regulation of civil law in Czechoslovakia.

The new Civil Code distinguished collective and individual forms of ownership. State and cooperative ownership represented collective forms of ownership, and on the other hand personal ownership with remarks on private ownership which was *expressis verbis* covered by the legal regulation of personal ownership[60] represented individual forms of ownership. It is worth mentioning that the Civil Code distinguished three subjects entering into legal relations: the State, corporate entities and natural persons, which correspond to the current definition of legal subjects. The Code abolished the old Roman law principle of *"superficies solo cedit"* (anything attached to the ground belongs to it) as well as the principle of *"res nullius"* (a thing which has no owner).

As a result of the evident influence of Soviet legal science, the traditional understanding of property rights based on Roman jurisprudence, which considered the owner's right over the subject of ownership as absolute, was suppressed. The Soviet influence was reflected in the adopted Civil Code of 1950, whereby previous individual forms of ownership were continually surpassed, and individual forms of Socialist ownership (private and personal ownership) became overlapping. The preferred form was Socialist collective ownership, and private ownership became considered as a transitional form of ownership.

3.2 Socialist state and land ownership after adoption of the Constitution of 1960

Political developments at the end of 1950's in Czechoslovakia showed that the constitutional regime based on a people's democracy no longer corresponded to the new needs of the Communist regime. The results of the XI Congress of the Communist Party of Czechoslovakia in 1958 showed that the developmental stage of Communism as formally promulgated in the preamble of constitutional law no. 100/1960 Coll., the Constitution of the Czechoslovak Socialist Republic, was completed.

The Constitution of the Czechoslovak Socialist Republic codified the leading role of the working class, and the Socialist character of social structure. The principal form of ownership was now considered to be Socialist public ownership, either in the form of state ownership or cooperative ownership. The Constitution also admitted individual ownership in the form of personal ownership by citizens and under certain limited circumstances also

[59] KUKLÍK, J. et al.: *Vývoj československého práva 1945 – 1989*, p. 130.
[60] See: Article 106 of Law no. 141/1950 Coll., the Civil Code.

private ownership.[61] After 1948 not only ownership rights reform was based on Marxism-Leninism, but economic tasks were as well, since the state was run based on a command/centrally-planned economy. The Constitution formally declared nationalisation of all production means, therefore including land which had been the subject of nationalisation in previous reforms. Civil Law regulation changed due to the influence of the Communist regime, especially in the area of *ius in rem* and the Law of Obligation compared to the previous regulation.

Law no. 40/1964 Coll., the Civil Code, encompassed new terminology on subjects of law which divided into three categories: citizens, Socialist organizations and the state. The argument against justification of a non-defining corporate entity involved the reasoning that the state handed over property to a state organization, not to the "collective of workers", who did not exercise any rights, nor could they as a whole engage in contractual relations. Such categorisation answered to the Socialist concept of land ownership arising from the Czechoslovak Socialist legal order.

Economic interests were decisive for the functioning of the Socialist state, and its decisions were made in line with this principle. The Czechoslovak Socialist Republic was no exception. The state created multiple organisations, production facilities and unions which were given property for business purposes by the state itself. *Ipso facto* were created independent business subjects separate from the state, even though the state retained its ownership rights over the property, fully in compliance with the principle of Communist common ownership. The term Socialist ownership meant full utilization of private property, which caused an imbalance in legal rights. Socialist society had the aspiration to fulfill the constitutional principle that *"Everyone (will work) according to his/her ability, everyone will be rewarded according to his/her work"* (Preamble II Part of the Constitution of Czechoslovak Socialist Republic, 1960).

Planned national economy was governed by Law no. 109/1964 Coll., the Commercial Code, which regulated property administration,[62] its possession and usage in compliance with tasks of the Socialist state. Land usage compared to USSR legislation was more complicated due to the fact that the Czechoslovak state did not become the sole owner of all land.[63] Basically in Czechoslovakia not all land was nationalised *en bloc,* but the Socialist form of collective land-use rights was principally applied. *"In the period after 1948 the separation of right of use from ownership became typical for the Land Law, which led to independence of various usage rights and therefore also to suppression of the basic function of ownership […]"*[64] The ownership rights which were positively defined corresponded with the rights of owners who could not legally dispose of the subject of their ownership. From this point of view it is desirable to examine whether the system of land ownership which concurred with the constitutional categorisation of ownership on the one hand, and with the Civil Code (from 1950 and 1964) along with the Commercial Code on the other hand, was from legal point of view narrower or wider than (or even differs at all from) older forms from past times.

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61 See: Articles 8 – 10 of the Constitution.

62 See article 63 – 75 Chapter IV: State socialist ownership, national property and its administration

63 In USSR and Mongolia was all-land nationalized and therefore state became sole owner of all land. Other subjects which could use land were entitled to use it and therefore the land was not subject of civil regulation as *res extra commercium*. Soviet legislation stated expresis verbis that the State cede its right to use land to organisations and citizens at no charge.

64 GAISBACHER, J.: *Základy pozemkového práva*, p. 14.

3.2.1 Kinds and forms of Socialist land ownership

In spite of the fact that land ownership differs from ownership of other objects, it does not create a new kind or form of ownership. The Constitution therefore does not have a legal provision giving an exclusive right of the state to land. *Ipso facto* land could be the subject of legal disposition [65] with the principle that land in Socialist state ownership had a tendency to increase compared to other forms of ownership, especially land as private property. For this purpose various legal instruments were created (e.g. prescription of property or possession[66]). In Czechoslovak Socialist society the form of Socialist ownership was crucial in its social and individual expression.[67]

Socialist public ownership according to the Constitution defined two basic forms which the Commercial Code broadened with two forms more.[68] Article 8 of the Constitution distinguished state ownership as ownership of the whole nation (national property) and co-operative ownership (property of people's co-operatives). In addition to exclusive ownership of national property,[69] the state could have other assets and establish companies or enterprises according to the Commercial Code.

Co-operative land ownership was endorsed by Czechoslovak Socialist law, but never gained significant importance since land as the main source of co-operative ownership was shared among the members of Unified Agricultural Co-operatives, but the latter retained its ownership.[70] The shared land of Unified Agricultural Co-operative members was in collective usage (Article 8 sec. 3 of the Constitution), and therefore it could not be considered as a source of Socialist co-operative ownership. Law no. 81/1949 Coll. of the Slovak National Council on Arrangement of Legal Relations on Pastures of Former Cooperative Members and Similar Estates was an exception, since pastures/grasslands belonging to former cooperative members became the property of the Unified Agricultural Cooperatives. According to this law, in some justified cases Unified Agricultural Cooperatives could become owners of land based on purchase contract, succession, donation or exchange.[71]

The Commercial Code broadened collective ownership to include the property of other collective organisations, e.g. recreation centres of the Revolutionary Trade Union Movement (ROH), or other so-called Socialist organisations. The law entitled them to acquire land as well, but basically the needs of such organisations were provided for by the state, which granted state property with the right to permanent usage free of charge according to Article 70 of the Commercial Code. It can be concluded that even this form of Socialist ownership gained significant importance.

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65 Production means (land, labour, capital) are considered by socialist society as res extra commercium due to its ineliability (see: Hayek, F. A.: Socialism and the Market: Collectivist Economic Planing. Volume II. London: Lund Humphries, 2001. p. 91). According Fábry land can be under certain circumstances subject of trade relations as comodity even though in its nature cannot be considered as commodity. (see: FÁBRY, V. et al.: Československé pozemkové právo. Praha: Ústav státní správy, 1981. p. 14)

66 BLAHO, P.: Niektoré teórie o držbe a ich kritika. In: *Právny obzor*, 1972, roč. 55 č. 8, pp. 759 – 773.

67 FÁBRY, V. et al.: *Československé pozemkové právo*. p. 71.

68 Compare article 8 of the Constitution with article 8 sec. 2 of Commercial Code.

69 Article 8 sec. 2 lists "mineral resources and basic energy sources; basic forest resources, waters and natural resources; means of industry production, public transportation and networks; financial and insurance institutions; radio and television broadcast network, cinematography, and also the most important social facilities like medical schools and scientific institutions" as national property.

70 ŠTEFANOVIČ, M.: *Pozemkové právo*. Bratislava: Eurounion, 2009, p. 206.

71 According article 490 sec. 2 of the Civil Code of 1964 were Unified Agricultural Cooperatives not eligible to acquire free building land from citizens.

Socialist individual ownership belonged in another group of ownership rights, and it was known in the form of personal ownership and private ownership. The Constitution defined personal ownership as citizens' ownership of consumer goods.[72] The Constitution did not mention private ownership *expressis verbis*, but within the Socialist economic system private farming was accepted on a small scale (excluding exploitation of any foreign work force), even though it was fundamentally based on private gain (Article 9 of the Constitution). Hereby the Constitution implicitly approved private ownership, as well as accepting that the utility function of the land could be used for private exploitation in order to fulfil the production needs of citizens (small-scale farms, i.e. presumption of production purpose) as well as satisfaction of personal needs (small garden in front of house). This indicates that land could have personal or private nature. Despite this the legal regulation was not clear regarding the form of individual ownership of land.

In the closing provisions of the Civil Code of 1964, the legislators implicitly identified an individual form of ownership of land, particularly in Article 489 which initially states that land belongs in the category of things which cannot be the subject of private ownership. At the same time it quotes the principle of legal protection against property infringement.[73] The theoretical reason leading to the conclusion that land could not be an object of private property is the idea that land is not a product of work and cannot be utilized as such. Work is the source of products which are utilized. The character of consumer goods is specifically that of objects of individual ownership right. Private ownership of objects, not only of land, was intentionally addressed in the closing provisions in line with the Socialist concept of systematic eradication of private property.

Conclusion

Land ownership based upon legal events is very changeable, subject to reform, and may be lost in the course of action of subjects entering into contracts, as well as due to legal events beyond people's control. The legal regulation of land use in the Czechoslovak legal order was fragmented from the beginning into several laws defining a number of different kinds, prepared by several bodies or by ad hoc commissions. The original fragmentation of Land Law legislation dating back to the first Czechoslovak Republic (1918 – 1938) as well as during the people's democratic regime (1948 – 1960) and during Socialist Czechoslovakia remained non-codified, in contrast to Land Law legislation in the Soviet Union, which was unified in codification.

Land in economic theory represents one factor of production (land, labor, capital) and therefore cannot be omitted as a subject of legal relations in the present, past or future. Socialisation efforts in our society led to a situation in which all land was under state control and planning, regardless of the ownership relations. It can be concluded that systematization and formal aspect of land ownership partially depended upon its purpose. Efforts of the Socialist state towards the legal arrangement of ownership rights were motivated primarily to achieve more effective agricultural production, and especially to achieve large-scale production by eliminating fragmented land, which was an obstacle to effective land use due to historical developments.

[72] Compare Article 10 of the Constitution with Article 127 ff. of the Civil Code of 1964.

[73] Private ownership therefore did not enjoy constitutional protection. See: KOLESÁR, J.*: Československé pozemkové právo*. p. 68.

Czechoslovak post-war land legislation in 1945 was based on the uncompleted land reform dating back to the times of the first Czechoslovak Republic. The Košice Government Program drafted the basic principles of the people's democracy in the state as well as the main principles which should be followed regarding land legislation. Firstly before the new land reform was launched, it was necessary to eradicate private ownership of land by people who were considered as enemies of the State (Hungarians, Germans and traitors) in the first stage of the Second Land Reform. During second stage of the Reform liquidation of large estates was completed, and in the third stage, after the *coup d'état* in February 1948 the New Land Reform was carried out.

One of the goals of the Socialist state was to systematically eradicate private ownership of land based on the socialisation of ownership relations via the right of collective usage, which restricted owners in the use of their object of ownership. Despite keeping private property as a form of ownership, a system of specific legal forms of land usage was created.

The Constitution stipulated Socialist ownership, either in the form of collective or individual ownership. Socialist public ownership as the preferred kind of ownership was designed to continually surpass individual ownership, which was known in the forms of personal and private ownership. Most notably private ownership was systematically replaced with other forms of Socialist collective ownership. This was the way the Socialist state dealt with reality, *i.e.* with the existence of private ownership of land which was granted by the Civil Code of 1964 on the one hand, and the Constitution of the Czechoslovak Socialist Republic of 1960, which defines personal ownership alone without mentioning private ownership on the other hand. This approach arose from the fact that the Czechoslovak state did not revolutionarily abolish private ownership of land, as happened in Soviet Russia soon after the October Revolution in 1917.

Summing up, state protection of ownership rights especially in the period after 1948 was a clear demonstration of negligence by the state authorities, whose decisions were in line with Communist Party decisions. During the Communist regime there was no difference between the terms owner, possessor and keeper (*Lat. detentor – possessor – dominus*). Those terms were eradicated from the legal order. Enormous infringement of private ownership and ownership rights generally was formally legislatively approved during certain stages of land reform in Czechoslovakia.

Súhrn
Socialistická koncepcia pozemkových vzťahov v ČSSR

Pozemkové vzťahy vznikajú, menia sa alebo zanikajú na základe právnych skutočností v priebehu pôsobenia a realizácie platných právnych noriem, a teda na základe právnych úkonov dotknutých subjektov, ale tiež aj právnymi udalosťami. V našich podmienkach právna regulácia exploatácie pôdy bola od začiatku existencie československého právneho poriadku obsiahnutá vo viacerých právnych predpisoch najrôznejšieho druhu a poslania, gestorsky pripravovaná rôznymi rezortmi, prípadne *ad hoc* komisiami. Pôvodná fragmentácia prvorepublikovej úpravy zostala zachovaná aj počas ľudovo-demokratického i socialistického Československa, v ktorom na rozdiel od Sovietskeho zväzu nedošlo ku kodifikácii pozemkového práva.

Ekonomická hodnota pôdy v ekonomickej teórii vystupuje ako jeden z výrobných faktorov (práca, pôda, kapitál), čo z nej robí neopomenuteľný predmet právnych vzťahov, tak v prítomnosti a budúcnosti, ako tomu bolo aj v minulosti. Výrazom socializačných snáh

v našich podmienkach bolo podriadenie všetkej pôdy záujmom štátu bez ohľadu na vlastnícke a užívacie vzťahy, ktorá je predmetom celospoločenskej kontroly a plánovania. Na základe uvedeného možno skonštatovať, že systematizácia a formálna stránka práva pozemkového vlastníctva bola do značnej miery závislá od účelového určenia jeho predmetu, konkrétneho pozemku. Usporiadanie vlastníckych a užívacích pomerov socialistickým štátom bolo motivované aj dosiahnutím efektívnejšej poľnohospodárskej produkcie – veľkovýroby prostredníctvom odstránenia rozdrobenosti pozemkov ako prekážok efektívneho využívania pôdy spôsobenej historickým vývojom.

Povojnové pozemkové zákonodarstvo v obnovenom Československu v roku 1945 nadviazalo na pozemkovú reformu prvej ČSR. Základné smerovanie pri riešení celoštátnych otázok pozemkového zákonodarstva položil Košický vládny program, ktorý načrtol okrem iného kontúry ľudovo-demokratického štátneho zriadenia. Predtým než sa pristúpilo k uskutočneniu samotnej pozemkovej reformy bolo nevyhnutné pristúpiť k likvidácii súkromného pozemkového vlastníctva osôb národnostne a politicky nepriateľských ako prvej etape pripravovanej druhej pozemkovej reformy. V druhej etape sa dokončila likvidácia veľkého majetku pozemkového a v tretej etape po februárovom prevrate v roku 1948 sa pristúpilo meritórne k uskutočneniu druhej pozemkovej reformy.

Jedným z cieľov socialistického štátu bolo postupnou socializáciou vlastníckych vzťahov k pozemkom prekonať právo na súkromné vlastníctvo, prostredníctvom sústavy socialistických užívacích inštitútov, napr. právo spoločenského užívania a i., ktoré obmedzovali vlastníka v užívaní predmetu jeho vlastníctva. V priebehu tohto procesu, pri zachovaní súkromného vlastníctva, bola vytvorená sústava špecifických pozemkovo-právnych užívacích inštitútov.

Socialistické vlastníctvo bolo ústavne vyjadrené buď v spoločenskom, alebo individuálnom prejave. Socialistické spoločenské vlastníctvo ako spoločensky preferovaný druh vlastníctva mal postupne vytlačiť individuálne vlastníctvo ktoré bolo tvorené osobným a súkromný vlastníctvom. Predovšetkým súkromné vlastníctvo bolo potláčané a nahradzované inými formami socialistického spoločenského vlastníctva. Socialistický štát sa uvedeným spôsobom vyrovnával s reálnym stavom, t. j. súkromným vlastníctvom pozemkov, ktoré vyplývalo z Občianskeho zákonníka z r. 1964 na strane jednej a Ústavou ČSSR, ktorá upravovala osobné vlastníctvo bez zmienky o súkromnom vlastníctve na strane druhej. Takýto prístup vyplýval z toho, že v ČSSR nedošlo k revolučnému odstráneniu súkromného vlastníctva k pôde, tak ako v sovietskom Rusku krátko po októbrovej revolúcii.

Možno skonštatovať, že ochrana vlastníckeho práva, najmä v období po roku 1948 bola demonštráciou svojvôle štátnych a straníckych orgánov. Kvôli vulgarizácii práva za komunistického režimu došlo k stieraniu rozdielov medzi pojmami majiteľ, držiteľ a vlastník (*lat. detentor – possessor – dominus*), ktoré z právneho poriadku vymizli. Jednoznačne išlo o rozsiahle zásahy štátu do vlastníckych vzťahov a vlastníckych práv vôbec, ktoré formálne uskutočňoval československý zákonodarca v jednotlivých etapách pozemkovo-právnych vzťahov prostredníctvom pozemkových reforiem.

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Marianna Novotná – Monika Jurčová[1]

Concept of prerequisites for establishing liability for damage in European tort law de lega ferenda[2]

Abstract: European Tort law, as a certain homogeneous part of European private law, covers the situations within which it is necessary to judge whether an entity suffering harm or other loss is entitled to claim compensation on these grounds from another entity with whom it is not linked by any legal relationship other than the one based on the fact leading to occurrence of harm (loss). The paper focuses on the fundamental part of each tort law system covering prerequisites for liability as necessary conditions stipulated by tort law (as well as by European soft tort law) for establishing and enforcing liability for damage. In this paper, soft tort law is represented by two academic initatives which have been drafted with the objective of creating a common basis for harmonization of tort law in Europe: the Principles of European Tort Law (an academic project concerned solely with tort law issues) and the Draft Common Frame of Reference (an academic project with broader private law outcomes including tort law principles), whereby both of them are considered by their creators as fundamental sources for further work in the process of forming a common and unified European tort law system.

Keywords: European tort law, Soft law, Prerequisites of liability, Wrongfulness, Damage, Causal link, Principles of Europan Tort Law, Draft Common Frame of Reference

1. Introduction

The concept of "European tort law" is generally used to identify harmonization activities in the field of tort law, although it permits a wide range of further possible interpretations since the concept itself is not strictly defined. In general three groups of rules may be identified which are linked to the concept of European tort law:

a) the first group of rules of European tort law is represented by EU legislation and practice of the European Court of Justice (European tort law de lege lata),
b) the second group is represented by national tort law regulations of the member states, and
c) the third group is formed by future European *ius commune* (European tort law de lege ferenda), which also includes the academic initiatives of the Principles of European Tort Law (PETL) and the Draft Common Frame of Reference (DCFR).

These three sets of rules are influence each other and create mutual links, whereby the link between the first and the second levels is formed by comparative law which, based on comparison and analysis of national jurisdictions, leads to identification of the third level, i.e. future European *ius commune*.

The result of this process is convergence of the legal regulations of the member states in the field of tort law, called the Europeanization of tort law. The Europeanization of tort law (whether by harmonization, unification or approximation) is realized either through the regulative methods of EU lawmaking in the form of adoption of regulations and directives as secondary legal acts of the Union, as well as through methods of spontaneous Europeanization of tort law, the result of which are especially the instruments of *soft law*.

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The *soft law* instruments leading to creation of a pan-European tort law system, and/or in their broader sense the system of non-contractual obligations, are represented especially by the two above-mentioned academic initiatives of non-institutionalized nature: PETL and DCFR.

2. Principles of European Tort Law and Draft Common Frame of Reference as academic tort law initiatives

The Principles of European Tort Law (*Grundsätze eines Europäischen Deliktsrechts*, *Principes de droit européen de la responsabilité civile*, *Principi di diritto europeo della responsabilità civile*, with the common abbreviation PETL) are a long-term established result of spontaneous Europeanization of private law in the field of tort law. As a result of work by significant (not only) European civil law experts working under the umbrella of the European Group on Tort Law (EGTIL)[3] the final text of PETL including a commentary was submitted to the conference in Vienna in 2005.[4]

Despite the declaration by its creators that the purpose of PETL is to present itself as a model law, the legislative-technical approach to its formulation and overall systematic structure prove that its form leans more towards a model law rather than a set of principles (despite the higher level of abstraction of certain provisions).

Even during the early stages of the work it was obvious that due to the many various legal systems with various values and traditions deeply embedded in particular European states, the idea of PETL as a set of unifying rules for the whole of Europe was a utopian notion, and efforts leading down that path would soon crash into insurmountable obstacles. For this reason, the European Group for Tort Law decided to submit the created system of rules as a basic platform,[5] which would, in the form of *soft law*, serve European countries as a common framework for further development of tort law.

The Draft Common Frame of Reference (DCFR) is an academic initiative prepared in the course of a programme of academic research by two bodies: the Study Group on a European Civil Code (the "Study Group") and the Research Group on Existing EC Private Law (the "Acquis Group").

The work on the DCFR can be dated back to July 2001, when the Commission published a *Communication on European Contract Law*[6]. With that first communication the Commission intended to broaden the debate on European contract law, which had so far been mainly limited to legal academia[7].

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[3] The members of European Group on Tort Law, being mainly the significant university professors, have been meeting each other on regular basis since 1992, when so-called Tilburg Group was founded by professor of Tilburg University Mr. Jaap Spier as a predecessor of the currently existing EGTL. European Group on Tort Law has been developing its activity with institutional support of European Centre of Tort and Insurance Law – ECTIL in cooperation with Research institution for European tort law of Austrian Academy of Sciences *(Forschungsstelle für Europäisches Schadenersatzrecht der Österreichischen Akademie der Wissenschaften)* which provide organization base for their work.

[4] European Group on Tort Law, Principles of European Tort Law: Text and Commentary. Wien : Springer Verlag, 2005.

[5] VAN DEN BERGH, Roger, VISSCHER, Louis. The Principles of European Tort Law: The Right Path to Harmonisation? In German Working Papers in Law and Economics, 2006, Paper 8, p. 2.

[6] Communication from the Commission to the Council and the European Parliament on European Contract Law, July 11th, 2004, COM(2001) 398 final (OJ 2001/C 255/01).

[7] See HESSELINK, Martijn. The European Commission's Action Plan: Towards a More Coherent European Contract Law? European Review of Private Law 4-2004, p. 397.

The next stage in a broad consultation which the Commission launched in July 2001 was the publication of the Communication of the European Commission to the European Parliament and the Council entitled: *A More Coherent European Contract Law; an Action Plan*[8], published in February 2003.

In December 2008 the DCFR was presented to the Commission as the conclusion of the first stage on the way to more coherent European contract law.

An interim outline edition of the DCFR was presented to the Commission in December 2007 and published in early 2008, then an outline edition was published in February 2009, followed later in that year by the full edition entitled Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Full Edition. The Full Edition sets out the principles, definitions and model rules of European private law together with explanatory and extensive comparative law material (commentaries and comparative notes) gathered in the course of the work.

Book VI of DCFR,[9] significant from the European tort law point of view, includes a model regulation of the Principles of European Law – Non-contractual Liability Arising out of Damage Caused to Another (PEL). The rules included in this book were prepared by the working team on extra-contractual obligations under the leadership of Prof. Christian von Bar, whereas the commentary on these rules together with the comparative notes on the law of non-contractual liability for damage of the member states are part of the publication of a series of Principles of European Law (PEL) which was released under the title Non-contractual Liability Arising out of Damage Caused to Another.

Modern tort law, which possibly reflects its derivation from initiatives seeking a common basis of European legal jurisdictions (PETL, DCFR), has no tendency to prefer any of the liability systems, but on the contrary it is based on the proposition that liability based on fault and liability without fault are neither contradictory, nor should they be viewed as mutually independent categories strictly separated by exact boundaries,[10] but as equal forms of liability which mutually complement each other and are continually linked.[11]

This conclusion is supported by the formulation of the basic rule[12] of the Sixth Book of DCFR, which refers to the causing of damage intentionally or due to negligence, or the causing of damage for another reason as bases for establishing liability. By this formulation DCFR clearly tries to mutually interconnect the form of liability traditionally formulated as "liability based on fault" with liability which is not based on fault (intention, negligence) within the commonly shared platform of the provision of Article VI - 1:101 of DCFR.

Pursuant to this provision a person who has suffered legally relevant damage is entitled to compensation *vis-à-vis* the person who caused such loss intentionally or by negligence, or if causing damage is attributable to that person for another reason. Where

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8 Communication from the Commission to the European Parliament and the Council; A More Coherent European Contract Law; An Action Plan, 12 February 2003, COM (2003) 68 final (OJ 2003/C63/01).

9 DCFR is divided into ten Books and that each Book is subdivided into Chapters, Sections, Sub-sections and Articles. In addition the Book on specific contracts and the rights and obligations arising from them was to be divided, because of its size, into Parts, each dealing with a particular type of contract.

10 See KOZIOL, Helmut. Basic Norm. In European Group on Tort Law, Principles of European Tort Law. Text and Commentary. Wien : Springer-Verlag, 2005, p. 20.

11 See BAUDISCH, Birgit. Die gesetzgeberischen Haftungsgründe der Gefährdungshaftung. Aachen : Shaker Verlag, 1998, p. 212.

12 Art. VI - 1:101 DCFR.

a person does not cause legally relevant damage intentionally or by negligence, they shall be liable for causing legally relevant damage only if so stipulated in Book VI Chapter 3 of DCFR.[13]

The basic provision of Article VI-1:101 DCFR covers all these cases of origination of liability (whether based on intention, negligence or in the absence of the above) with three preconditions which must be cumulatively present in order to establish a claim for compensation of damage:

a) loss having the nature of so-called "legally relevant damage"
b) grounds for liability (attributability) of damage and
c) causal link.

The basic norm of PETL[14] is based on the assumption according to which a certain entity is liable to compensate for damage caused only in case the requirements laid down by PETL for origination of liability legal relationship are met, i.e. when the causing of damage may be attributable to that entity from the legal point of view. This structure corresponds to the Roman law legal principle of „*casum sentit dominus*", expressing the notion that everyone must bear any damage suffered, except for cases where a legal basis exists for shifting liability to another entity. The structure of shifting of liability to other entity than the aggrieved party is formulated in PETL as so-called legal attributability of damage to an entity other than the person who suffered damage. In accordance with the basic norm, damage may be attributed to another entity if:

a) damage was caused by culpable violation of the required standard of conduct of that entity,[15] or
b) damage was caused by abnormally dangerous activity of that entity[16] or
c) damage was caused by other persons for which that entity is liable (an auxiliary within his assignment, or a minor or a mentally-disabled person for whom the entity exercises care).[17]

Preconditions may be derived from the above-mentioned fundamental provision of PETL, the existence of which is necessary for the origination of a claim for compensation of damage. These preconditions are within the PETL concept of damage (recoverable damage), the existence of any of three reasons of attributability of damage (fault, dangerous activity or liability for others) and a causal link.

3. Concept of modified wrongfulness in the European soft law system

From the point of view of national laws, the institution of wrongfulness is usually linked either to violation of a certain statutory duty or in general to violation of a certain legally-protected interest and/or a certain harmful condition which is against the law. In most cases wrongfulness may be defined as an objective element of preconditions of liability since it has an objective basis (*unlawfulness, illicité* as an objective element),[18] as distinguished from fault. In certain laws (typically French) the above-mentioned is

[13] Art. VI-1:101 sec. 2 DCFR.
[14] Art. 1:101 PETL.
[15] Art. 4:101 PETL.
[16] Art. 5:101 PETL.
[17] Art. 6:101 PETL.
[18] KOZIOL, Helmut. (ed.) Unification of Tort Law: Wrongfulness. Kluwer Law International, 1998.

accompanied(as a precondition for wrongfulness itself) by focus on subjective liability (*culpability, culpabilité*), whereby various combinations apply in relation to attributability of harmful acts or their culpable occurrence.[19,20]

When viewing the concept of wrongfulness in national legislations,[21] inconsistency and conceptual deviations led the authors of DCFR and PETL to the creation of a separate concept inspired by the German BGB. The concept of wrongfulness itself *(Rechtswidrigkeit)* is not mentioned in DCFR and PETL texts, nor is it explicitly expressed in PETL and DCFR rules as an obligatory feature of civil law liability, and nor is it expressed in the manner common for national laws. The reason for this approach was not only the fact that this institution, as a concept worth following[22], was unconvincing, but also the fear that in the future interpretation misunderstandings and ambiguities might occur as a result of different approaches of national laws towards assessment of the concept of wrongfulness in its pan-European perception.

3.1. Modified concept of wrongfulness in the DCFR

The concept of wrongfulness in the legal regulation of DCFR is not based on its traditional perception but is modified in favour of the concept of attributability of legally-relevant damage,[23] which forms one of the fundamental preconditions for the origination of liability. The said concept may be derived from Chapter 2 of Book VI of DCFR, which more closely defines the subject matter of legally-relevant damage, i.e. such loss which is recoverable from the DCFR point of view in connection with Chapter 3 of DCFR and its calculation of grounds of attributability.

Subsequently the concept of wrongfulness may be derived from recoverability of legally-relevant damage arising:

a) directly from DCFR (legally-relevant damage is explicitly referred to in Chapter 2 of Book VI of DCFR)
b) *ex lege* (in case of violation of statutory law)
c) from violation of interests worthy of legal protection.[24]

The first set of cases of wrongfulness is derived directly from the "normative" rules of DCFR, while the other two are derived from the norms of national laws or legal review by the relevant authority applying the law.

The concept of "wrongfulness" directly derived from DCFR is linked with particular subject matters stipulated in Articles VI.-2:201 to VI.-2:211,[25] which are deemed illegal acts by DCFR.

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19 ELISCHER, David. Protiprávnost v Principech evropského deliktního práva (PETL) a v Návrhu Společného referenčního rámce (DCFR). In *Novotná, M. – Jurčová, M.* (eds.): Súkromné právo v európskej perspektíve. Trnava : Typi Universitatis Tyrnaviensis, spoločné pracovisko Trnavskej univerzity v Trnave a Vedy, vydavateľstva Slovenskej akadémie vied, 2011, p. 41.

20 VAN GERVEN, Walter., LEVER, Jeremy., LAROUCHE, Pierre. Cases, Materials and Text on National, Supranational and International Tort Law. Oxford : Hart Publishing, 2000, p. 352 ff

21 KOZIOL, Helmut. Conclusions. KOZIOL, Helmut (ed.) Unification of Tort Law: Wrongfulness. cit. supra, p. 129 ff .

22 VON BAR, Christian. Ausservertragliche Haftung für den Einem Anderen zugefügten Schaden. Das Buch VI des Draft Common Frame of Reference. In European Review of Private law, 2010, Nr. 2, p. 205 – 207.

23 SWANN, Stephen. Conceptual Foundations of the Law of Delict as Proposed by the Study Group on a European Civil Code. Working Paper No. 130. In InDret, 2003, Nr. 2, p. 8.

24 ELISCHER, David. Protiprávnost v Principech evropského deliktního práva (PETL) a v Návrhu Společného referenčního rámce (DCFR), cit. supra, p. 48.

25 Personal injury and consequential loss, loss suffered by third persons as a result of another's personal injury or death, infringement of dignity, liberty and privacy, communication of incorrect information about another,

The concept of "wrongfulness" arising from the other two sets may be more or less easily applied in case of violation of statutory law. This includes cases or subject matters of such actions which are not expressly quoted by DCFR in its enumeration, although they include unlawful intervention to such rights which are an immanent part of national legislation. However, detecting wrongfulness in the case of the third set is much more complicated, as in this case it depends on review of the application of laws by some authority, in particular whether in the case of deciding upon compensation of damage it is possible to qualify certain interests as ones worthy of legal protection, and thus classify their violation in the wrongfulness concept.

Attributability of legally-relevant damage in DCFR is built upon the presence of three grounds: intention, negligence, and cases of attributability with no presence of intention or negligence.[26] With regard to attributability, the concept of fault (even though they tried to avoid using this term in DCFR) was divided into two sub-categories consisting of intention and negligence, whereas the third category of stricter liability as the reason for attributability was additionally identified with the descriptive term: attributability without intention or negligence.

DCFR expressly stipulates the definition of intention and negligence, despite the fact that most national laws leave the issue of definition to doctrinal approaches and jurisprudence[27].

Considering legally-relevant damage, intention is present if a person intends to cause damage of the type caused, or if legally-relevant damage is caused by behaviour which is intended by this person and, at the same time, it was known to that person that such damage or damage of such type would certainly or almost certainly be caused as a result of such behaviour.[28]

Negligence is primarily linked with behaviour which does not correspond to the standard of care required by statutory provision, the purpose of which is to protect a person from loss suffered[29] (statutory standard of behaviour) and, secondarily, it is linked with behaviour which otherwise does not correspond to the level of care which could otherwise be required from a reasonably cautious person given the circumstances.[30]

In respect of strict liability as the grounds for attributability of legally-relevant damage, DCFR does not accept the general clause model, but on the contrary it is based on the principle of specific nature of individual cases of stricter liability as stipulated in Articles VI.-3:201 through VI.-3:207 DCFR (Accountability for damage caused by employees and representatives, Accountability for damage caused by the unsafe state of an immovable property, Accountability for damage caused by animals, Accountability for damage caused by defective products, Accountability for damage caused by motor vehicles, Accountability for damage caused by dangerous substances or emissions, Other accountability for the causation of legally-relevant damage).

breach of confidence, infringement of property or lawful possession, incorrect advice or information, unlawful impairment of business, unfair competition, impairment of natural elements constituting the environment, fraudulent misrepresentation inducement of non-performance of obligation.

26 Chapter 3 Book VI DCFR.

27 WAGNER, Gerhard. The Law of Torts in the Draft Common Frame of Reference. Available on http://ssrn.com/abstract=1394343, p. 15.

28 Art. VI.-3:101 DCFR.

29 Art. VI.-3:102 a) DCFR.

30 Art. VI.-3:102 b) DCFR.

3.2. Modified concept of wrongfulness in the PETL

In respect of the wrongfulness concept, the authors of PETL linked the concept of attributability of damage caused on the basis of legally-stipulated grounds (Swiss model) with a more or less precisely defined set of legally-protected interests (German model).[31]

The concept of legally-protected interests in PETL is based on the assumption that the law assigns protection to the subjective rights and interests of certain persons, whereby at the same time it requires from everyone else to honour this legally-protected area. Thus finally the acceptance of the protected area of another person leads to restriction of one's own possibilities of behaviour (restriction of freedom to act) by the setting of barriers beyond which the legally-protected interests of others would be violated or threatened. Due to the fact that there are mutually contradictory interests facing each other, the extent of protection of subjective rights and interests must be determined in an extremely sensitive manner, based on mutual "weighing up" of contradictory interests.

With the aim of providing assistance to national courts, when deciding upon the extent of the protected area, EGTL prepared, based on national reports and comparative analysis, the factors relevant for review of the extent of the protected area.

The extent of the protected area within PETL is derived from a hierarchy of legal interests, whereby the scope of protection awarded depends on the nature of the protected interest,[32] i.e. the higher the value, the more precise the determination and clarity, and the broader the protection. [33]

From the point of view of the value of protected interests and their mutual hierarchy, the highest protection is assigned to life, bodily and mental integrity, human dignity and liberty; the next (lower) level is represented by property rights (*in rem* rights) including rights to intangible property, and the lowest level is represented by pure economic interests arising from contractual relationships. The extent of protection may be affected also by the type of liability in the sense that certain interests enjoy a higher level of protection against caused loss than other cases, and last but not least, when deciding on the extent of protection it is necessary to consider both public interest as well as the interest of the acting entity, especially as far as freedom of acting and exercise of a right is concerned.

The question of whether in a particular case a violation of a legally-protected interest has occurred is resolved by application of the so-called "three-stage" system based on which particular assessment criteria are subject to weighing. When creating this three-stage methodology[34] the authors of PETL were motivated especially by differences in perception of wrongfulness in national laws,[35] which required formulation of this separate approach.

The first step leads to the discovery of whether an entity has threatened the rights and interests protected by law. In case no violation of a legally-protected interest has occurred, it

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[31] ELISCHER, David. Protiprávnost v Principech evropského deliktního práva (PETL) a v Návrhu Společného referenčního rámce (DCFR), cit. supra, p. 41.

[32] Opposite view WERRO, Franz. The Swiss Tort Reform: a Possible Model for Europe? Selected Remarks, Including a Short Assessment of the Principles of European Tort Law. In: *BUSSANI, Mauro. (ed.) European Tort Law. Eastern and Western Perspectives*. Berne : Stämpfli Publishers, 2007, p. 93 ff

[33] See Art. 2:102 sec. 1 PETL.

[34] See KOZIOL, Helmut. Die „Principles of European Tort Law" der „European Group on Tort Law". In: Zeitschrift für Europäisches Privatrecht, 2004, Nr. 2, p. 240 – 241. *Dulak, A.* Princípy (európskeho) deliktného práva. In: *Lazar, J., Blaho, P.* (eds.) Základné zásady súkromného práva v zjednotenej Európe. Bratislava : Iura Edition, 2007, p. 303.

[35] DULAK, Anton. Princípy (európskeho) deliktného práva, cit. supra, p. 303.

is impossible to claim liability vis-à-vis the entity. In contrast, if an entity violates a legally-protected interest, it act unlawfully in the abstract meaning,[36] i.e. illegally in the sense of the traditional civil law definition of illegality. However this fact itself is not sufficient grounds for origination of liability, but it is necessary to review the second step. Despite the above the completion of the first stage carries certain legal consequences, including an option to apply defence measures[37] (necessity, self-help).

The first stage of review is close to the German concept of *Erfolgsunrechtslehre*, which is focused on illegality of the result of behaviour of an entity.

The second stage of review is focused on review of behaviour of an entity in respect of the required standard of conduct in accordance with fulfilment of objective criteria of its violation, as stipulated in Article 4:102 PETL. This step is reasonable in respect of establishment of liability for fault, whereby the conditions for fulfilment thereof are stipulated in Article 4:101 of PETL. At this stage the discovery of objective violation of due care may lead to establishment of liability provided that other liability elements also apply in concurrence (concurrence of increased danger may lead to turning of the burden of proof and thus to establishment of liability for presumed fault according to Article 4:201 of PETL).[38]

The second stage of review is close to the Austrian concept of *Verhaltensunrechtslehre,* which is focused on illegality of behaviour itself (manner of actions), and not the result of behaviour.

The third step is linked with the possibility of attributing fault (intentional or negligent violation of the required standard of behaviour) to particular entity according to Article 4:101 of PETL. The fulfilment of this third step gives justification for establishment of liability for damage caused (it is applied in the case of subjective liability based on fault).

The grounds upon which it is possible to attribute caused damage to the liable entity, creating together with the concept of legally-protected interest the fundamental precondition for origination of liability, may be structured, under the classification by PETL, in three groups:

a) liability for fault
b) liability for risk
c) liability for other individuals.

Inclusion of liability for other individuals as separate grounds for liability was subject to criticism, whereby the basic objection against liability for others as a differentiating basis of legal attributability of damage is especially the fact that liability for others (vicarious liability) may be of nature both subjective as well as strict liability, so that as a result its designation as a separate category is not reasonable.[39]

Ad A) Liability based on fault

Origination of liability based on fault in PETL regulations assumes intentional or negligent violation of the required standard of behaviour (required level of care – whether through acting or omission). A certain entity is charged with a duty to compensate damage, provided that other preconditions for liability are fulfilled, if its behaviour does not correspond to what may be reasonably expected from it.[40]

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36 KOZIOL, Helmut. Die „Principles of European Tort Law" der „European Group on Tort Law", cit. supra, p. 240.
37 Ibidem, p. 241.
38 Ibidem.
39 PANTALEÓN, Fernando. Principles of European Tort Law: Basis of Lability and Defences. A critical view „from outside". In: *InDret,* 2005, Nr. 3, p. 2. Available on-line na http://www.indret.com/pdf/299_en.pdf.
40 Art. 4:101 PETL.

The duty to maintain a certain standard of activity is included in the Anglo-American concept of tort protection through *duty of care*. The fundamental standard of activity is care/thoughtfulness of a typical reasonable person. Liability for damage caused to another entity can be claimed vis-à-vis an entity if that entity has a *duty of care* towards the other entity, and it violates that duty. Violation of the mandatory degree of care is a category standing between the European categories of fault and wrongful behaviour. *Duty of care* alone stipulates the personal scope of duty of care, thus treating the issue of who must be respected and who has a claim for compensation of damage caused by another. [41]

The required standard of conduct is behaviour of a so-called "reasonable person" taking into account the circumstances of the particular case, whereby evaluation of the standard of conduct depends on the nature and value of the protected interest affected (the higher the value of the protected interest, the higher the protection assigned), hazardousness of the activity (the acting person must adapt their behaviour to the nature of the activity performed by them), experience which may be expected from the acting person (if an entity acts within the exercise of its profession, this means that the highest degree of experience which the aggrieved party relies on may be expected), foreseeability of occurrence of damage (foreseeability as an objective category assessed as of the time of the activity which leads to occurrence of damage), mutual relationship between tortfeasor and the aggrieved party (the closer the relationship between the entities, the higher the degree of cautiousness assumed on the part of the acting entity due to the rightful interests of the other party, which the acting tortfeasor should know due to the closeness of the relationship) as well as the degree of achievability and the costs necessary for realization of precautionary or alternative methods (if a goal may be achieved by application of various methods, it is necessary to choose a method which least threatens the rightful interests of others, whereby it is necessary to choose a method which is safe despite the fact that itentails higher cost).[42]

When judging the required standard of conduct it is necessary to take into account the rules which prescribe or prohibit certain behaviour, i.e. acting in contradiction to such rules (violation of such rules) shall constitute grounds for classifying that behaviour as culpable violation of the required standard of conduct.

The above criteria (factors) of judgment of standard of conduct of a reasonable person have objective nature as defined in Article 4:102 par. 2 PETL, according to which the required standard of conduct may be adjusted due to age, mental or physical disability, or due to extraordinary circumstances to which a person cannot be expected to conform. The goal of the provision thus formulated, modifying the objective criteria of standard of conduct, is to mitigate these criteria in the sense that their rigidity is remedied in respect of the actual mental maturity of a particular person.

The model of standard of conduct of a "reasonable person" should not be viewed, in the judgement of the authority reviewing the application of law, as the behaviour of an "average member of society", but the standard of conduct of the modern type of „*bonus pater familias*" *(good family father*, *le bon père de famille)*, who does not pursue only his own goals, but on the contrary, always takes into account the interests of other persons as well.[43]

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[41] CSACH, Kristián. *et al.* Profesijná zodpovednosť. Zodpovednosť za škodu spôsobenú pri výkone vybraných činností s akcentom na europeizáciu deliktuálneho práva, cit. supra, p. 68 – 81.

[42] See Art. 4:102 sec. 1 PETL and European Group on Tort Law, Principles of European Tort Law. Text and commentary, cit. supra, p. 75 – 79.

[43] WIDMER, Pierre. Liability Based on Fault. In Principles of European Tort Law. Text and commentary, cit. supra, p. 76.

The concept of a "reasonable person" is variable and may be adapted to a particular case, however not in relation to a particular liable person but in relation to the group (category) which is represented by that person (the required standard of conduct is not the same in the category of "reasonable" surgeon (expert) and the category of "reasonable" general practitioner).[44]

Ad B) Liability without fault (strict liability)

Unlike the case-specific regulation of particular sources of danger, strict liability in PETL is based on a general source clause which imposes upon persons carrying out abnormally dangerous activity stricter liability for damage typical for the risk represented by the practised activity and the danger arising from such activity.

Danger in this view is defined as the mutual effect of two elements: possible extent and probability of occurrence of damage.[45]

The presence of a high degree of danger substantiates the replacement of fault, as a precondition for occurrence of liability, with other elements which determine the area of stricter liability in its restricted sense.[46]

In PETL a high degree of danger is linked with the concept of abnormally dangerous activity identified by two factors: the creation of foreseeable and significant risk of occurrence of damage, even in cases where all due care is observed when carrying out the activity, as well as the exclusion thereof as a subject of common use.

Despite the fact that the provision formulated as mentioned above extends the scope of liability without fault beyond the borders of common regulations of objective liability in EU member states,[47] the concept of "abnormal" hazardousness of an activity vastly limits the extent of application thereof. Restrictive formulation of the mentioned provision limiting its applicability to "abnormally" dangerous activities is modified to a certain extent by the possibilities of national laws to designate other cases of liability without fault for dangerous activities not reaching the degree of abnormally dangerous activities.[48] Other cases of stricter liability may be determined by application of analogy in respect of other sources of comparable danger of occurrence of damage, unless otherwise stipulated by national law.[49]

Ad C) Liability for others

Legal regulation of liability for others includes both cases of liability for minors or persons subject to mental disability as well as cases of liability for auxiliaries. With the above-mentioned differentiation PETL rejects a generalizing approach to resolving the issue of liability for others in order to avoid an inappropriate mixture of liability for others based on fault with cases of objective liability for others.[50]

The entity liable for damage caused by a minor or person subject to mental disability is an entity who exercises custody over such a person.

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44 Ibidem.

45 KOCH, Bernard. *A*. The Work of the European Group on Tort Law – The Case of "Strict Liability", cit. supra, p. 7. Art. 5:101 sec. 3 PETL.

46 Ibidem, p. 8.

47 WAGNER, Gerhard. The Project of Harmonizing European Tort Law. In: *Common Market Law Review*, 2005, Nr. 5, p. 1269 ff, p. 1282.

48 Art. 5:102 sec. 1 PETL.

49 Art. 5:102 sec. 2 PETL.

50 Cf. MORÉTEAU, Olivier. Liability for others. In: *Principles of European Tort Law. Text and commentary*, cit. supra, p. 113.

Liability for minors and persons subject to mental disability is structured as a presumed liability,[51] from which a person conducting custody may be relieved if the custody duty was duly fulfilled (demonstration of acting in compliance with the required standard of conduct during the exercise of custody).
Liability for auxiliaries is a liability of relevant entity (individual or legal entity) for damage caused by its auxiliaries (for the purposes of the said provision an independent contractual party is not deemed an auxiliary), acting within the exercise of a task conferred upon them, provided that the auxiliaries have violated required standard of conduct. The impact of this provision is not limited solely to the field of employment (although the most frequent example of "auxiliary" (used person) falling under the mentioned provision is an employee in relation to his/her employer), however the application thereof is possible even in a broader extent and in general in relation to the persons acting under supervision of the liable party.

4. Concept of damage

The concept of damage as one of the fundamental building blocks of both harmonization initiatives is based on the definition of so-called recoverable damage in PETL and of so-called legally-relevant damage in DCFR.

This structure of "damage" in PETL and in DCFR points to the fact that not every unfavourable consequence suffered by an entity is relevant also from the point of view of tort law. As things stand, legal relevance is assigned only to recoverable and/or legally-relevant damage assuming pecuniary or non-pecuniary loss on a legally-protected interest.

From the terminological (and strictly linguistic) point of view, in relation to the usage of terms damage and loss in DCFR and PETL texts, it is necessary to state that the term damage as used in PETL as well as DCFR, i.e. as a term linked with recoverable pecuniary and non-pecuniary loss, may in the context of European initiatives of tort law be deemed as a legal structure of unfavourable consequences which impact a legally-protected interest (i.e. in this view damage is a legal category). The terms harm, loss are based more on the natural law approach to unfavourable consequences, and PETL and DCFR initiatives use these terms in order to differentiate pecuniary and non-pecuniary loss.

On the other hand, due to the used concepts of recoverable damage in PETL and legally-relevant damage in DCFR, the strict differentiation of these two categories of terms is not really significant and both initiatives use them rather synonymically in their texts.

4.1. Concept of legally-relevant damage in DCFR

In relation to the definition of damage as a fundamental precondition of civil law liability, DCFR deals, as already mentioned above, with a concept of legally-relevant damage which may take the form of pecuniary loss, non-pecuniary loss or loss of health.

The chapter dedicated to regulation of legally-relevant damage consists of two sections within which a combination of approaches is applied: while the second section presents specific cases of legally-relevant damage, the first section uses an abstract approach,

[51] Ibidem, p. 114.

consisting of rules of general nature which broaden the area of explicitly-mentioned cases of legally-relevant damage by determination of conditions whose fulfilment gives rise to qualification of loss not falling under Section 2 as legally-relevant damage. The definition of legally-relevant damage, as a combination of both approaches, is thus built on three pillars,[52] including losses:

a) arising from the rules of Chapter 2 of DCFR
b) arising from violation of rights otherwise granted by law
c) arising from violation of interests worthy of legal protection.

The losses which may be assigned under the second or third categories of legally-relevant damage are subject to a two-stage test within the process of qualification as legally-relevant damage, in which the first stage refers to fairness and reasonability *(fair and reasonable)* of granting a right to reparation or prevention. The second stage (remedying to a certain extent the overall vagueness of the given criteria[53]) specifies in more detail the facts upon which the judgement is made, whether the granting of a right to reparation or prevention is fair and reasonable. Within this evaluation process the following must be taken into account: the grounds of attributability, the nature and proximity of damage or impending damage, the reasonable expectations of the person who suffers or would suffer the damage, and considerations of public policy.

The first category of legally-relevant damage is built on a case-specific approach, enumerating particular types of loss whose content is determined by Articles VI.-2:201 through 2:211 DCFR.

The first area of legally-relevant damage explicitly arising from DCFR comprises:

a) personal injury and consequential loss
b) loss suffered by third persons as a result of another's personal injury or death
c) infringement of dignity, liberty and privacy
d) loss upon communication of incorrect information about another
e) loss upon breach of confidence
f) loss upon infringement of property or lawful possession
g) loss upon reliance on incorrect advice or information (legally-relevant damage inspired by the *Hedley Byrne case*[54])
h) loss upon unlawful impairment of business
i) burdens incurred by the state upon environmental impairment
j) loss upon fraudulent misrepresentation
k) loss upon inducement of non-performance of obligation

The particular image of the second category of legally-relevant damage depends on the incorporation of certain subjective rights that have been violated into the normative text of national legal regulations, whereby this way of fulfilment of the condition of recognition by national law is observed. Rights otherwise conferred by law are deemed to be all those rights which are qualified by the relevant law as absolute rights, whereby it applies that they need not be just absolute rights of private law nature (such as the right to vote). In contrast, the rights of relative nature which are applied *inter partes* are excluded from the concept of rights otherwise conferred by law.

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[52] VON BAR Christian. Principles of European Law. Non-contractual liability arising out of Damage caused to Another. Munich : Sellier, 2009, p. 303.

[53] ELISCHER, David. Pojetí škody, resp. újmy v akuálních dokumentech evropského deliktního „soft law". In: *Právník*, 2011, Nr. 4, p. 378 ff, p. 392.

[54] Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465.

The particular form of the third category of legally-relevant damage depends on the judgement by the authority applying the law as to whether in a given case of violation of a certain interest it is an interest worthy of legal protection, and whether the loss arising from this violation may be qualified as legally-relevant damage.

The concept of legally-relevant damage formulated in this manner creates an open and flexible system enabling its further formation in the future, especially by way of judicial interpretation.

4.2. Concept of recoverable damage in PETL

The concept of damage as one of the preconditions of occurrence of liability in PETL is built on a view of damage in its restrictive meaning, which was "normatively" reflected in the conceptual definition of so-called recoverable damage, i.e. damage capable of compensation.[55] The precondition so structured may imply that PETL leads to a legal rather than natural understanding of loss.

The legal definition of damage as pecuniary and non-pecuniary loss caused to interests protected by law does not trigger doubts regarding the possibility of compensating not only material loss but also immaterial loss.

According to PETL recoverable damage also includes so-called costs of preventive measures such as *costs arising from prevention of threatening damage*. These costs constitute recoverable loss to the extent that they are reasonably incurred.[56] The possibility of demanding compensation of costs of preventive measures is subject to cumulative fulfilment of the conditions of direct threat of occurrence of damage and the reasonability of incurring such costs, whereas the fact of whether or not damage has actually occurred is irrelevant.

Alongside the legal definition of damage, Article 2:103 PETL includes a negative definition of the concept of damage (this approach may be deemed innovative) specifying the type of damage which is unrecoverable. In accordance with the provision of this Article it is impossible to claim compensation of damage in respect of losses related to activities or sources viewed as illegal. If an activity or source of advantage is illegal or reprobated by law, loss of revenue from such illegal activity does not constitute grounds for compensation of damage. In this respect it is however necessary to note that only damage directly caused by activities or sources viewed as illegal is not recognized. It follows that other damage arising from this source or activity (such as non-pecuniary loss or bodily injury) is not excluded from compensation.

4.3. Pecuniary and non-pecuniary damage in European tort law de lege ferenda

In terms of the PETL as well as the DCFR initiatives, recoverable damage includes both pecuniary loss (material loss) as well as non-pecuniary loss (immaterial) loss.

Alongside recognition of the possibility of compensation of pecuniary and non-pecuniary loss, these terms are directly defined in Article VI.-2:101 par. 4 of DCFR. While

[55] Art. 2:101 PETL.
[56] Art. 2:104 PETL.

pursuant to this provision pecuniary loss *(economic loss)* includes *loss of revenue or profit, costs incurred and reduction of asset value,* non-pecuniary loss *(non-economic loss)* includes *pain and suffering as well deterioration of life quality.*

From the point of view of terminology of the used terms of pecuniary and non-pecuniary loss (damage), it is necessary to specify that during preparation of the rules of non-contractual liability for damage it was not important to decide which of the terms *economic loss – pecuniary loss* or *non-economic – non-pecuniary loss* was to be chosen, due to the fact that, *inter alia*, even in the UK the use of these terms is not consistent.

The enumeration of particular types of pecuniary loss is only demonstrative and may include also other types of loss, whereby only the most significant are listed as examples (due to inability to create an exhaustive enumeration of all types of pecuniary loss). In general, pecuniary loss in DCFR may be classified as the negative difference between the current asset status of the aggrieved party *(status quo)* and the status specifically prior to occurrence of the damaging event *(status quo ante)*.[57] In addition to such reduction of assets the pecuniary loss also includes increase in liabilities.

A similar situation, that is the inability to define all types of loss, is also related to its immaterial part, within which pain, suffering and reduction of life quality form only "the least controversial"[58] cases of non-pecuniary loss, which were included for this very reason in the taxonomic enumeration of its types. Due to the above, other types of loss arising from interference with moral rights which are not implied *expressis verbis* in the definition of non-pecuniary loss may also be considered as non-pecuniary loss under DCFR.

Following from its definition of recoverable damage, PETL defines in general the concept of recoverable pecuniary damage[59] as the diminution of the victim's patrimony caused by the damaging event. Such damage should in principle be determined as specifically as possible, which however does not exclude (if appropriate) also its abstract determination, for example by reference to market value. The concept of recoverable non-pecuniary loss is not directly defined in the Principles, although its content can be derived from the concept of pecuniary loss, which implies that damage must be considered non-pecuniary if it does not lead to any reduction in assets[60] (i.e. if the loss incurred can not be classified under pecuniary damage). When judging the extent of protection[61], damage to interests may justify compensation of non-pecuniary loss (especially including cases of personal loss, loss of freedom, dignity or other moral rights). From the point of view of compensation of non-pecuniary loss the fundamental indicators are severity, duration and consequences of loss, whereby PETL enables the authority applying the law to decide directly about compensation of such loss based on procedure and subject to assessment of the particular factors stipulated in PETL.

[57] VON BAR, Christian. Principles of European Law. Non-contractual liability arising out of Damage caused to Another, cit. supra, p. 313.

[58] VON BAR, Christian. The notion of damage, cit. supra, p. 398.

[59] Art.10:201 PETL.

[60] KOZIOL, Helmut. Damage. In: *European Group on Tort Law, Principles of European Tort Law*. Text and commentary, cit. supra, p. 28.

[61] Art. 2:102 PETL.

4.4. Pure economic loss in European tort law de lege ferenda

In relation to the institution of loss which is recoverable within European tort law initiatives, there is a special place for the concept of *pure economic loss (reines Vermögenschaden, dommage purement économique)*[62], meaning loss which does not occur as a result of direct unauthorized interference with the moral rights or property of an entity, i.e. which is not derived from physical damage to a person or the property of a given entity.

The category of pure economic loss is an institution which is not recognized in all legal jurisdictions[63], or the content of this term may be understood with quite different connotations. The common attribute is the fact that none of the legal jurisdictions could find appropriate general criteria for compensation of pure economic loss, although this is an area highly controlled by *ius in causa positum*.[64] English and German laws represent the most intensive rejection of identifying pure economic loss with the categories of personal loss and pecuniary loss, whereas this attitude is supported by economic analysis of tort law. [65]

Chapter 2 of Book VI of DCFR admits that pure economic loss presents a certain problem, and while the concept of *pure economic loss* is not directly mentioned in DCFR texts, this institution is present in DCFR implicitly,[66] arising from certain provisions.[67] However, the possibility of compensation for pure economic loss is also admitted by von Bar, who states that DCFR in principle does not distinguish between economic loss and pure economic loss[68] or the liability based on fault (in contrast to strict liability), and permits considerably more cases of legally-relevant damage, especially loss which is currently identified as "pure economic loss" in many legal jurisdictions.[69]

The concept of pure economic loss in PETL is derived from the concept of loss caused to legally-protected pure economic interests whose protection may be of lower degree compared to the subjective rights of personal and property nature, as mentioned in Article 2:102 par. 4 of PETL. In these cases it should be specially observed whether there is a close connection between the acting and threatened persons, or whether the acting person is aware that they may cause damage, despite the fact that the value of their interest is in any case lower than the value of the interests of the aggrieved party. The limitation of granting protection to pure economic interests is a consequence not only of their lower degree of classification in the hierarchy of protected interests, but also of the fact that pure economic interests are not self-evident, and lack clear definition.[70]

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62 BUSSANI, Mauro, PALMER, Vernon Valentine. (eds.) Pure economic loss in Europe. New York : Cambridge University Press, 2003; VAN BOOM, Willem. Pure Economic Loss: A comparative perspective. In: VAN BOOM, Willem., KOZIOL, Helmut., WITTING, Christian. (eds.) *Pure economic loss*. Wien : Springer-Verlag, 2004; GAUCH Peter., SWEET, Justin. *Deliktshaftung für reinen Vermögensschaden. Festschrift für Max Keller*. Zürich, 1989; VAN DUNNÉ, *J. M.* Liability for Pure Economic Loss: Rule or Exception? A Comparatist's View of the Civil Law – Common Law Split on Compensation of Non-Physical Damage in Tort Law. In: *European Review of Private Law*, 1999, Nr. 4, p. 397 ff

63 BUSSANI, Mauro, PALMER, Vernon Valentine (eds.) Pure economic loss in Europe, cit. supra.

64 VAN DAM, Cees. European Tort Law. cit. supra, p. 171.

65 WAGNER, Gerhard. The Law of Torts in the Draft Common Frame of Reference, cit. supra, p. 8 ff.

66 Ibidem, p. 10 – 11.

67 Art. VI.2-204, VI.-2.205, VI.-2.207, VI.-2.208, VI.-2.209, VI.-2.210, VI.-2.211 DCFR.

68 VON BAR, Christian. Ausservertragliche Haftung für den Einem Anderen zugefügten Schaden. Das Buch VI des Draft Common Frame of Reference, cit. supra, p. 205. VON BAR, Christian. Non-contractual Liability arising out of Damage caused to Another under the DCFR, cit. supra, p. 36.

69 VON BAR, Christian. The notion of damage, cit. supra, p. 396.

70 KOZIOL, Helmut. Damage. European Group on Tort Law, Principles of European Tort Law. Text and

5. Causal link

Consolidation of the causal link is required by all modern liability systems as a necessary precondition for occurrence of liability, whereby the causal link is preferred to any other link (e.g. spatio-temporal).[71] Despite the substantial position granted to the institution of causal nexus by tort law, and in spite of various (although rather partial) doctrinal approaches as well as approaches of judicial practice seeking appropriate criteria for determination of a legally-relevant causal link, it can be concluded that the "causal link is the court's and academic's headache more than any other tort law issue"[72].

In the European national doctrines of continental nature the issue of determination of causal link is related to the concept of „*conditio sine qua non*", which is mirrored in the common law countries by the concept of *"but for test",* whereby this is the best known method of determination (discovery) of causation. The challenge is to prove factual causation, and in order to do so a court of law conducts a hypothetical evaluation of whether loss occurred to the victim even without any wrongful act by the liable entity or without any damaging incident.[73]

Application of the concept of *conditio sine qua non* or the concept of *but for test* as the method of establishing factual causation has significant restrictions and insufficiencies, especially in the case of chaining of several circumstances leading to occurrence of loss, whereby these rules are practically inapplicable in case of alternative and cumulative causal link. Some authors even consider these concepts outdated (Dutch and Spanish academics especially rank amongst the most critical[74]).

5.1. Concept of causation in DCFR

According to the fundamental rule[75] determining causal link in DCFR, legally-relevant damage is caused by a person if the damage is regarded as a consequence of that person's conduct or the source of danger for which that person is responsible. This general rule implies that according to DCFR causal link is deemed as the necessary connection between a) intentional or negligent acts of a person against whom liability is to be claimed or a source of danger for which that person is responsible, and b) legally-relevant damage.

Due to the controversial nature of distinguishing between factual and legal causation, DCFR did not incline towards this step, whereas (as mentioned in the commentary on the said provision[76]) the generally-formulated fundamental rule of establishing the causal link leaves the issue of such theoretical differentiation or the extent thereof open for further discussion.

As stated by Wagner,[77] the formulation of the definition of the concept of "causation" in Article VI.-4:101 of DCFR is remarkable, especially through application of the expression

commentary, cit. supra, p. 33.

71 BANAKAS, Stathis. Unde venis et quo vadis? European tort law revisited, cit. supra, p. 302.

72 FLEMING, John. *G. The Law of Torts*, 9th edition. Sydney : Law Book Company, 1998, p. 218.

73 STŮHMCKE, Anita. *Essential Tort Law*. Sydney, London : Cavendish Publishing, 2001, p. 48.

74 VON BAR, Christian. *The Common European Law of Torts*. Volume Two. New York : Oxford University Press, 2000, p. 437.

75 Art.VI.-4:101 DCFR.

76 VON BAR, Christian. Principles of European Law. Non-contractual liability arising out of Damage caused to Another, cit. supra, p. 751.

77 WAGNER, Gerhard. The Law of Torts in the Draft Common Frame of Reference, cit. supra, p. 24.

"is regarded…". This formulation rather indicates a normative understanding of causation, going beyond simple "*but for*" thinking by overlapping factual elements with normative ones. Identification of the causal link in DCFR is therefore rather a normative legal element than a factual or scientific one.

In DCFR the general rule of determination of causation is supplemented by the so-called "*egg shell skull*" rule which is applied within DCFR in cases of personal injury (bodily injury) or of death of the injured person. According to this rule, in cases of personal injury or death the injured person's predisposition with respect to the type or extent of the injury sustained is to be disregarded.[78] In respect of determination of causal link, the application of this rule leads to the result that the (original) health of the injured person is disregarded for the purposes of the type and extent of loss which is suffered by them, which does not leave the liable person with the option to contest the causal link (and thus permit liberation from liability), arguing that the bodily injury or death would have occurred anyway due to the personal predisposition of the injured, even without the existence of the given grounds of attributability of liability on the part of the tortfeasor (the action of the tortfeasor and/or the source of danger for which they are liable). However, depending on the particular situation, it is possible to admit that some previously-existing bodily injuries of the injured may be relevant in respect of reduction of the amount of awarded compensation for the damage caused.[79]

A special category of determination of the causal nexus includes cases of so-called "collaboration" in causing the legally-relevant damage, i.e. specific cases of co-participation of several persons in causing the occurrence of damage, even if these "collaborating" persons do not directly participate in causing the damage, but nonetheless they contribute to the existence of the primary source of its occurrence. According to VI.-4:102 of DCFR *a person who participates with, instigates or materially assists another in causing legally-relevant damage is to be regarded as causing that damage.*

The above-mentioned especially includes situations which may be labelled as cases of "psychological causation",[80] meaning the shared responsibility of the "collaborating" person for the decision or intention of the directly-acting person, or for initiating an impulse for action by the directly-acting person.

This provision has its real applicability especially in liability for intention, whereby the intention must be present on the side of the "principal" tortfeasor as well as on the side of the "collaborating" person. In contrast, in cases of liability where no relevance is given to the intention or negligence of the tortfeasor, this provision may not be applied due to the fact that in these liability cases no action by the liable party is specifically required.[81]

The above-mentioned cases of participation of "collaborating" persons in causing legally-relevant damage have led to the establishment of solidary liability of the directly-acting person and the "collaborating" persons.

Critical responses in respect of the rule of Article VI.-4:102 of DCFR[82] deal mainly with the excessively abstract character of the used concepts of collaboration, instigation and assistance, the detailed structure of which is left to jurisprudence and judicial practice.

78 Art.VI.-4:101 sec. 2 DCFR.

79 VON BAR, Christian. Principles of European Law. Non-contractual liability arising out of Damage caused to Another, cit. supra, p. 754.

80 Ibidem, p. 774.

81 Ibidem, p. 773.

82 WAGNER, Gerhard. The Law of Torts in the Draft Common Frame of Reference, cit. supra, p. 26.

Application of these vague, insufficiently defined concepts is inappropriate for resolving the issue of liability of the participating persons in the solidary liability regime. The rule of application of solidary liability established for example only on the requirement of *material assistance to another in causing legally-relevant damage* means too large an area of applicability without any restrictions.

With regard to issues of causal uncertainty (as special cases of causation) DCFR (as opposed to PETL) deals *expressis verbis* with cases of alternative causation only. In this respect the following is stipulated in Article VI.-4:103 of DCFR: *"Where legally-relevant damage may have been caused by any one or more of a number of occurrences for which different persons are accountable, and it is established that the damage was caused by one of these occurrences but not which one, each person who is accountable for any of the occurrences is rebuttably presumed to have caused that damage."*

According to DCFR a rebuttable legal presumption of causing damage by any and all applicable alternative tortfeasors is established in respect of alternative causation, whereby DCFR apparently deviates from the concept of alternative causal link stipulated in PETL. Adoption of this structure is reasoned by the commentary on the relevant provision of DCFR, which uses the idea of more equitable benefit for the injured,[83] in respect of whom, when considering the issue of placing a burden of risk of inability to discover the actual cause (causes), it seems more equitable to place the burden of this risk upon those whose liability is considered, in spite of any doubts regarding the cause actually leading to the occurrence of damage.

In this case in respect of the causal link, the injured person must demonstrate the fact that the acting person would have been liable for the damage caused, if it is possible to identify a causal link of contribution by that person to the occurrence of damage, whereas at the same time it should be demonstrated that the given person belongs among the group of persons regarding whom it is possible to declare with certainty that one of them surely did not cause the damage.

In the opinion of the authors, the DCFR regulation dedicated to the causal link was intentionally left within the more restricted extent of the general clause in Article VI.-4:101, which is followed only by three special rules (the *egg-shell skull* principle, the rule of collaborating persons and the rule of alternative causes). Most of the problematic aspects of causation can not be inserted into the framework of general abstract solutions, so they are left to legal theory and judicial practice, thus resulting in the belief of the authors regarding the rules on the causal link that regulation via the general clause is sufficient.[84]

5.2. Concept of causation in PETL

When determining causation, PETL primarily argues using the content of the formula *conditio sine qua non (csqn)*, which represents factual causation (the requirement imposed by the rule according to which some activity or conduct is a cause of the victim's damage if, in the absence of the activity (omission), the damage would not have occurred[85])

[83] VON BAR, Christian. Principles of European Law. Non-contractual liability arising out of Damage caused to Another, cit. supra, p. 781.

[84] VON BAR, Christian. Ausservertragliche Haftung für den Einem Anderen zugefügten Schaden. Das Buch VI des Draft Common Frame of Reference, cit. supra, p. 221.

[85] Art. 3:101 PETL.

and sets the scope of liability constituting legal causation which enables limitation of attributability of damage. This concept indicates that for determination of the causal link it is necessary to determine the factual causal link as well as to judge the circumstances (especially the foreseeability of damage, nature and value of the protected interest, and grounds for liability) determining the actual fact or extent of attributability of damage to the injured person. In case it is impossible to establish the factual causation, legal causation constituting the scope of liability is not determined.[86]

In the third chapter of the Principles dedicated to the causal link, the members of EGTL tried for the first time[87] to propose, in addition to defining the general rule of determination of causation, a solution to the problematic aspects of causation in theory as well as practice, especially as far as the issues of cumulative causation, alternative causation, interrupted causation or minimum causation are concerned.

In case of plurality of actions of which any would independently cause damage at the same moment, according to the Principles each such action is deemed a cause of damage occurring to the injured person. Despite the fact that none of the actions is *csqn*, since damage would have occurred even by force of the other actions, each such action is deemed as a cause of occurrence of damage (concurrent causes). The structure of above-mentioned cumulative causation leads to a resolution of solidary liability of multiple tortfeasors which is generally recognised by legal theory.

Alternative causation includes cases in which (as opposed to cumulative causation, where each action would have caused damage) it is demonstrated with certainty that damage was caused either by the actions of person A or of person B, despite the impossibility of determining exactly which of the actions was the actual cause of damage.[88] Each such action which would independently have been sufficient as the cause of damage may be deemed to have been the cause, but only in the extent corresponding to the probability of causing damage to the injured person, i.e. the given actions are viewed as proportionate causes of damage. The entity liable for the occurrence of damage is obliged to compensate only such loss which could have been caused from the point of view of probability, , whereby that entity is not liable for damage which, from the probability point of view, was caused by another entity, the injured person him/herself, or damage occurring due to *force majeure*.[89]

A separate solution is provided for the situation where in the case of several injured entities it is not sure whether the particular loss was caused to the injured persons by certain actions, whereby it is evident however that those actions did not cause damage to all of the multiple injured entities. Therefore, from the "global" point of view, there exists a causal link between the loss suffered by multiple injured entities and the actions of multiple potential tortfeasors, but it is not possible that each particular tortfeasor caused the entire damage in respect of all of the injured perons.[90] The action of each

[86] Cf. SPIER, Jaap. Causation. In European Group on Tort Law, Principles of European Tort Law. Text and Commentary, cit. supra, p. 44.

[87] KOZIOL, Helmut. Die „Principles of European Tort Law" der „European Group on Tort Law", cit. supra, p. 244.

[88] Cf. SPIER, Jaap. Causation. In European Group on Tort Law, Principles of European Tort Law. Text and Commentary, cit. supra, p. 48.

[89] See VAN DEN BERGH, Roger, VISSCHER, Louis. The Principles of European Tort Law: The Right Path to Harmonisation? In: *German Working Papers in Law and Economics*, 2006, Article Nr. 8, p. 13, 22 ff. Dostupné on-line na http://www.bepress.com/gwp/default/vol2006/iss1/art8.

[90] Cf. SPIER, Jaap. Causation. In European Group on Tort Law, Principles of European Tort Law. Text and Commentary, cit. supra, p. 49.

of the tortfeasors is therefore deemed as a cause of the damage suffered by each of the injured only to the extent of liability in which the actions could have caused damage to the particular injured person.

The advantage of the concept of proportionate causes of occurrence of damage in cases of alternative causation and the related duty of the injured person to provide partial compensation corresponding to the probability of the damage being caused is undoubtedly the waiving of borderline solutions of either solidary liability *vis-à-vis* all potential tortfeasors, thus giving the injured person the possibility of claiming compensation to the full extent from any of them, or on the contrary the possibility of being denied any compensation for damage due to the fact that liability is not demonstrated *vis-à-vis* any of the potentially liable entities.

The concept of individual share in causation reflecting the degree of probability in respect of the actual cause of damage was adopted by the House of Lords in the well-known case *Barker v. Corus*,[91] by which the rule of solidary liability dealt with in the similarly well-known Fairchild case was overruled.[92] The decision in *Barker v. Corus* triggered negative reactions from the public, resulting in adoption of the *Compensation Act 2006*, by which the original concept of solidary liability was re-established.

In the case of two actions independent of each other, where one of them leads definitely and unavoidably to damage being caused to the injured person, while the other, subsequent action would have independently caused the same damage as the first, the subsequent action is not taken into account (arguing that the subsequent action does not constitute *csqn* for the occurrence of damage) and full liability is placed upon the first of the tortfeasors, except for the case if the subsequent action leads to the occurrence of additional or more severe loss, which must be reflected in that case.[93]

The above-mentioned concept of so-called potential causal link generally leading to exclusion of liability of the others from the acting tortfeasor(s) has various insufficiencies, and from the economic point of view it is not the most appropriate solution of the given situation. Should none of the actions of the first tortfeasor constitute *csqn* for the occurrence of damage, so that his/her liability is based purely on potential causation, and if subsequent actions would cause the same loss, then imposing the same liability upon the other tortfeasor(s) seems to be a more equitable solution.[94]

Cases of so-called minimum causation (so-called indefinite partial causation) deal with issues where it is obvious that several related actions have jointly contributed to the occurrence of damage, however in spite of the above it is impossible to prove which consequence was caused by which particular action. If however it is ascertained that no action could have caused the entire damage autonomously, due to this fact PETL presumes that the actions which apparently (each to a minimum extent) contributed to occurrence of damage caused the damage equally.

91 *Barker v. Corus UK Ltd.* (2006) 2 A.C. 572 (HL 2006).

92 *Fairchild v. Glenhaven Funeral Services Ltd.* (2003) 1 A.C. 32 (HL 2002).

93 Art. 3:104 PETL.

94 VAN DEN BERGH, Roger, VISSCHER, Louis. The Principles of European Tort Law: The Right Path to Harmonisation?, cit. supra, p. 14.

Conclusion

Despite the fact that the leading projects of European tort law de lege ferenda (the Principles of European Tort Law and the Draft Common Frame of Reference) are academic initiatives prepared in the course of academic research activities, they have already gained broader acceptance relating to their toolbox function for European and national legislators, mainly regarding the concepts and terms used.

The EU member states can use the basic platform of the DCFR and PETL principles as a source of reference for certain considerations within the reasoning of judicial rulings[95] in the process of creation of national court practice or directly as a source of inspiration in the revision of the provisions of tort law, especially in the process of re-codification of private law codes.

Concepts of wrongfulness, damage and causation presented by PETL and DCFR offer a wide range of various options which can be further specified and crystallized within national or supranational legal systems, with the aim of finding the "right" path to the harmonisation of tort law at the European level.

Súhrn
Koncepcia predpokladov vzniku zodpovednosti za škodu v európskom deliktnom práve *de lege ferenda*

Predkladaná štúdia rieši problematiku predpokladov vzniku právneho vzťahu náhrady škody v oblasti európskeho deliktného práva *de lege ferenda*. Pojem „európske deliktné právo" (*European tort law*) sa vo všeobecnosti používa na označenie harmonizačných aktivít v oblasti deliktného práva, v rámci ktorých možno identifikovať tri skupiny pravidiel, ktoré sa spájajú s týmto pojmom: európske deliktné právo *de lege lata* v zmysle deliktno-právnej legislatívy EÚ a judikatúry Súdneho dvora, národné deliktno-právne úpravy členských štátov a európske deliktné právo de lege ferenda, ktoré zahŕňa akademické iniciatívy PETL (Principles of European Tort Law) a DCFR (Draft Common Frame of Reference), pričom na poslednú z uvádzaných skupín sa autorky orientujú v rámci svojho analytického skúmania.

Východiskové pravidlo[96] šiestej knihy DCFR (upravujúcej deliktné právo) formuluje ako dôvod vzniku zodpovednosti zapríčinenie (spôsobenie) škody úmyselne alebo z nedbanlivosti alebo jej zapríčinenie z iného dôvodu. V zmysle uvádzaného ustanovenia osoba, ktorej vznikla právne relevantná škoda, má právo na jej náhradu voči osobe, ktorá túto ujmu spôsobila úmyselne alebo z nedbanlivosti alebo ak je zapríčinenie škody tejto osobe pričítateľné z iného dôvodu. Tam, kde osoba nespôsobila právne relevantnú škodu úmyselne alebo z nedbanlivosti, zodpovedá za zapríčinenie právne relevantnej škody iba vtedy, ak tak ustanoví kapitola 3. knihy VI DCFR.[97]

Východiskové ustanovenie článku VI-1:101 DCFR zastrešuje všetky uvádzané prípady vzniku zodpovednosti (či už na základe úmyslu, nedbanlivosti alebo bez ich prítomnosti) tromi predpokladmi, súčasná prítomnosť, ktorých zakladá právo na náhradu škody:

[95] Relating to PETL e.g. ELISCHER, David: Protiprávnost v Principech evropského deliktního práva (PETL) a v Návrhu společného referenčního rámce (DCFR). In: NOVOTNÁ, Marianna., JURČOVÁ, Monika. (eds.): *Súkromné právo v európskej perspektíve*. Trnava : Typi Universitatis Tyrnaviensis, 2011, p. 39.

[96] Článok VI - 1:101 DCFR.

[97] Porovnaj článok VI-1:101 ods. 2 DCFR.

a) ujma, ktorá má charakter tzv. „právne relevantnej škody“
b) dôvod zodpovednosti (pričítateľnosti) škody a
c) príčinná súvislosť.

Základná norma PETL[98] vychádza z premisy, v zmysle ktorej je určitý subjekt povinný nahradiť spôsobenú škodu iba vtedy, ak splnil zároveň požiadavky uložené PETL na vznik zodpovednostného právneho vzťahu, t.j. vtedy, ak možno takémuto subjektu spôsobenie škody z právneho hľadiska pričítať.

Konštrukcia prenesenia zodpovednosti na iný subjekt ako poškodeného je v PETL formulovaná ako tzv. právna pričítateľnosť (právne pripísanie) škody subjektu odlišnému od osoby, ktorej škoda vznikla. Škodu možno v súlade so základnou normou pričítať určitému subjektu, ak:

a) škodu zapríčinilo zavinené porušenie vyžadovanej úrovne správania sa tohto subjektu,[99] alebo
b) škodu zapríčinila mimoriadne nebezpečná činnosť tohto subjektu[100] alebo
c) škodu zapríčinili iné osoby, za ktoré subjekt zodpovedá (pomocník v rámci výkonu svojej úlohy alebo maloletá alebo duševne chorá osoba ktorej starostlivosťou je subjekt poverený). [101]

Z vyššie uvedeného základného ustanovenia PETL možno vyabstrahovať predpoklady, existencia ktorých je nevyhnutná pre vznik práva na náhradu škody a ktorými sú v rámci koncepcie PETL:

a) škoda (nahraditeľná škoda);
b) existencia jedného z troch dôvodov pričítateľnosti škody (zavinenie, nebezpečná činnosť alebo zodpovednosť za iného) a
c) kauzálny nexus.

Štúdia analyzuje jednotlivé koncepty použité pri formulovaní predpokladov vzniku právneho vzťahu náhrady škody osobitne vo vzťahu k DCFR a k PETL a v ich vzájomnej interakcii. Napriek tomu, že uvádzané základné projekty európskeho deliktného práva sú svojou povahou akademickými iniciatívami a výsledkom vedeckého výskumu, z hľadiska svojho významu nadobúdajú stále širšiu mieru použiteľnosti, ktorú možno identifikovať predovšetkým v rámci napĺňania komparatívnej funkcie smerom k inšpirácii pre národnú a nadnárodnú normotvorbu a sudcovskú tvorbu práva, a to najmä vo vzťahu k základným konceptom a k použitej terminológii.

Modifikovaný koncept protiprávnosti, koncepcia relevantnej ujmy a nahraditeľnej škody, ako aj koncept príčinnej súvislosti, prezentované v PETL a DCFR, ponúkajú široký rozsah rôznych alternatív, ktoré sa môžu ďalej precizovať a kryštalizovať v rámci národných a nadnárodných právnych systémov, hľadajúc tak tu správnu cestu k prípustnej miere harmonizácie deliktného práva na európskej úrovni.

98 Článok 1:101 PETL.
99 Článok 4:101 PETL.
100 Článok 5:101 PETL.
101 Článok 6:101 PETL.

Michal Maslen[1]

Proportionate measures adopted by the public authorities within public administration in the Slovak Republic

Abstract: The author analyzes the content of the principle of proportionality and its results within the sphere of public administration in the Slovak Republic. He compares these results with the legal basis for the use of administrative measures taken by the authorities in the field of information disclosure, nature and landscape protection, freedom of assembly and the legality of evidence.

Key words: principles, proportionality, rule of law, Constitution, court, balance, legislation, public interest, individual, right, freedom.

1. Introductory remarks

Principles of law are usually defined by legal theory. In such case they serve as interpretation tools. Great significance for the content of the legal principles also lies in the case law of the European Court of Human Rights, which applies the provisions of the Convention on Protection of Human Rights and Fundamental Freedoms. On the other hand the principles can also play the role of unwritten sources of law. Therefore they can also be developed by the case law of the Court of Justice of the European Union. All these ideas arise from the point of view that rejects the existence of gaps within the legal system and within the area of human rights protection. Therefore the principles have allowed the courts to implement the rule of law in different fields of law, of which the legislation usually makes no mention. For example the Court of Justice of the European Union identified the group of principles which are common to all the national legal systems of the member states of the Union. These are compatible with European Union objectives. This is the case with the principle of legal certainty, the principle of legitimate expectations (which protects an individual from unforeseeable amendments to the law) and also the case of the principle of proportionality. From the point of view of the Court of Justice of the European Union, if the principles are not common to all national laws, they may be derived from particular national laws. For the time being the German and French legislations have been the most inspiring from among the group of Union member states. In these cases the Court of Justice took inspiration from the principles enshrined in certain national legal systems only. This is also the case when the Court must name the institution responsible for harm caused by the European Union and it must determine the extent of the harm. Finally the principles may be specific only to the European Union. In such case the Court of Justice of the European Union identifies the principles specific to the European Union even if the source of their inspiration was from a national legislation. This is the case with the solidarity between Member States, institutional balance and Community preference.[2]

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[1] JUDr. Michal Maslen, PhD. (Trnava). This work was supported by the Slovak Research and Development Agency under the contract No. APVV-0024-12.

[2] See: The *Non-written sources of European Law*. (Available at: http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14533_en.htm, February 26th 2014, 11:20 CET.).

So to summarize, we can say that the principles of law comprise unwritten legal rules. They are applied by certain judicial institutions. They help to fill in the gaps left by the legislator. The judicial institution applying the principle uses it as an aid in the process of interpretation. The principles in this kind of legal view serve as the basis for judicial control. Therefore the principles play an important part in shaping judicial practice.[3]

As for the *"gap-filling"* function, the principles thus ensure the autonomy and coherence of the legal system. The tool of interpretation helps to interpret the normative influence of the human rights and fundamental freedoms. In addition, the principles also play an important role in the process of finding the limits of powers. When giving expression to a principle, the legislature must respect the essential content of that principle. Otherwise, the resulting legislation could be declared void.[4]

Some also say that judges apply the principles of law when determining the lawfulness of legislative and administrative measures taken by public authorities. The content of them is created by fundamental human rights. They are based on a variety of international treaties protecting human rights and fundamental freedoms. Therefore the human rights form an integral part of them. The European Court of Justice or the European Court of Human Rights did not create them. They found them through inspiration based on the constitutional tradition common to member states of the European Union or common to member states of the Council of Europe. Therefore the main part of the inspiration arose also from the content of the Convention for Protection of Human Rights and Fundamental Freedoms.[5]

This fact is also explicitly expressed by the Charter of Fundamental Rights of the European Union (hereinafter *"the Charter"*). The Charter reaffirms within its preamble the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on the European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.

2. Proportionality of measures according to the Charter of Fundamental Rights of the European Union and according to the Convention on Protection of Human Rights and Fundamental Freedoms

Therefore Article 51 of the Charter establishes the obligation of authorities of the Union and of the authorities of the member states to apply their powers on a legal basis and with regard for the principle of subsidiarity. They must therefore respect the rights, observe the

[3] See: LÕHMUS, U.: *Fundamental Rights and General Principles of EU Law : Functions, Scope and Range*. (Available at: https://www.juridica.ee/juridica_en.php?document=en/articles/2011/9/204614.SUM.php; February 26th 2014, 14:19 CET.).

[4] See : LENAERTS, K. – GUTIÉRREZ-FONS, J. A.: *The Constitutional Allocation of Powers and General Principles of EU Law.* (Available at: http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2013/11/The-contitutional-allocation-of-powers-and-general-principles-of-EU-law-K.-Lenaerts-J.-Gutierrez-Fons-CMLR-2010.pdf; February 26th 2014, 14:06 CET.).

[5] See : VERSETTI, A.: *General Principles of EU Law + Implementation of EU Law through Directives and Regulations.* Available at: http://www.academia.edu/2210317/General_Principles_of_the_EU_Law_Implementation_of_the_EU_Law_through_Directives_and_Regulations; February 26th 2014, 15:10 CET..

principles and promote the application thereof in accordance with their respective powers. What does this mean for the authorities? The answer can be found within Article 52 of the Charter. Any intervention in the exercise of a right or freedom must be carried out in accordance with the law and with respect to the essence of that right or freedom. Limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others. Discretionary power must be accepted by the law, and the Union recognizes the principle of restricted discretion in the same manner as the Council of Europe, which means being a part of the principle of lawfulness.

As for the content of discretionary power the Court of Justice of the European Union builds its doctrine on the arguments arising from the Convention on Protection of Human Rights and Fundamental Freedoms. The application of discretionary power results from a certain legal basis. Therefore case law analyzes its content in relation to the legality control carried out by an independent and impartial court established by law. Article 6 (1) ECHR requires that subsequent control of a measure imposed by an administrative body must be undertaken by a judicial body that has full jurisdiction. Thus the court must be able to quash in all respects, on questions of fact and of law, the challenged decision.[6] The authorities of the Union go further and they apply this approach to the field of competition, because the Commission disposes of a specific extent of discretionary powers in this field of Union law. So the Court of Justice of the European Union must not only verify the substantive accuracy of the evidence submitted, its reliability and consistence, but it also has to consider whether that evidence contains all the information which must be taken into consideration in a complex situation, and whether it is capable of substantiating the conclusions drawn from it. When imposing a measure within competition law, an authority cannot be regarded as having ***any margin of discretion in the assessment of complex economic matters*****,** which goes beyond the leeway that necessarily flows from the limitations inherent in the system of legality review. The conclusions drawn by the authority must be supported by law, which means they must be considered in a lawful way and also supported by the facts of the case.[7]

As for the opinion of legal theory, in order to enable a public authority to act within its scope, it needs to use some material, financial, personal and legal instruments. A special position among the legal instruments of public authorities is held by their power or competence. These give the authority authorization to exercise public power. An authority holding the proper competence authoritatively decides on the rights and obligations of entities that are not in an equal position with the authority. A measure or a decision that the authority adopts does not depend on the will of the entity to which it is addressed. In the field of public administration, power occurs mainly through regulations and related abstract acts, acts of a specific nature, administrative contracts, enforcement and administrative supervision.[8] Powers of authorities of public administration thus represent all the legal instruments available for the performance of tasks arising from their scope. A specific type of power is administrative discretion. Administrative discretion is the possibility of the administrative authority of keeping a certain tolerance band to formulate its conclusions independently. The administrative discretion which an administrative authority uses (e. g. when determining the amount of a fine) cannot be arbitrary and must always follow the

[6] See: Judgment of the European Court of Human Rights Janosevic v. Sweden, no. 34619/97, Reports of Judgments and Decisions 2002-VII.

[7] Judgment Posten Norge of April 18th 2012, no. E-15/10.

[8] See also: HENDRYCH, D. a kol.: *Správní právo Obecná část*. 6. vydání. Praha: C. H. Beck, p. 117.

essence of the law. When applying discretion the legislation must deal with the application of the law to the facts of the situation. The administrative authority may decide on the application of a measure on the basis of administrative discretion. But it must strictly deal with the criteria established by law. Therefore it also has the obligation to base its decision on their evaluation.[9]

The establishment of principles controlling administrative discretion is particularly important when issuing administrative acts relating to the rights and freedoms and legitimate interests of natural and legal persons. The concept of an administrative act assesses case law and jurisprudence in its broadest sense, that is, that concept includes a specific measure or decision by a public authority.[10] Jurisprudence and case law agree that the law may not delegate to an administrative authority the power to act arbitrarily. It only can to a greater or lesser degree of abstraction define the conditions under which the administrative authority decides on the subjective rights of individuals. The modern concept of discretion must be based on those fundamental assumptions.[11] The existence of criteria of lawful administrative discretion is not in doubt and it is indispensable. Failure to respect the criteria of execution of powers is also a misuse of powers. Breach of those rules causes improper performance of public administration and the misuse of administrative discretion. The main principles laid down for the exercise of public administration always include among other things the concept of proportionality related to the object of the administrative discretion.[12]

For example there is a general rule in Germany governing admissibility in administrative proceedings. It is to be found in Article 42(2) of the German Judicial Code. The effect of this provision is that applications for the review of administrative actions are admissible only if (a) they are based on a legal provision whose purpose is to protect individual rights and (b) the individual applicant falls within the scope of its protection. The right to bring an action for judicial review thus amounts to a 'right which protects individuals', as enshrined in Article 19(4) of the German Constitution. During the course of such an action, the court may review facts *ex officio*, examine whether all the factual elements necessary for a decision were present, evaluate the legality of the decision (e. g. by assessing whether it has infringed a principle such as ***proportionality***) and verify that the decision was not taken *ultra vires*. The court may exercise its powers of review even where administrative authorities have a margin of discretion. This process amounts to a particularly intense level of judicial scrutiny of administrative discretion.[13] Similarly in Slovakia the rule of Article 13 of the Constitution of the Slovak Republic applies, that the *"Limits to basic rights and freedoms may be set only by law under conditions laid down in this Constitution. Legal restrictions of basic rights and freedoms must apply equally to all cases which meet prescribed conditions. When*

9 See also: The Judgment of the Supreme Court of the Slovak Republic of March 10th 2011, no. 3 Sž 4/2011.

10 See also: KOŠIČIAROVÁ, S.: *Princípy dobrej verejnej správy a Rady Európy*. Bratislava: Iura Edition, spol. s r. o. 2012, p. 188.

11 See also: MASÁROVÁ, Ľ.: *K právnej úprave niektorých zásad správneho konania. In: Všeobecné správne konanie*. Zborník z medzinárodnej vedeckej konferencie 8. – 9. októbra 2009. Bratislava: Univerzita Komenského v Bratislave, 2010. p. 76.

12 See also: SKULOVÁ, S.: K vývoji soudního přeskumu správního uvážení s akcentem na některé problémy spojené s rozsahem a obsahem přeskumu správního uvážení ve správnem soudnictví. In: MASLEN, M.: *Správne súdnictvo a jeho rozvojové aspekty.* In: Zborník príspevkov vedeckej konferencie s medzinárodnou účasťou konanej 7. – 8. marca 2011 v Trnave. Bratislava: Ikarus sk. Eurounion, 2011, p. 262 – 263.

13 See: Opinion of Advocate General Sharpston, delivered on December 16th 2010, Court of Justice of the European Union, case no. C-115/09.

restricting the basic rights and freedoms, attention must be paid to their essence and meaning. These restrictions may only be used for the prescribed purpose". There is also a connection to Article 46(2) of the Constitution of the Slovak Republic under which *"Anyone who claims to have been deprived of his rights by a decision of a public administration body may turn to the court to have the lawfulness of such decision reexamined, unless laid down otherwise by law. The reexamination of decisions concerning basic rights and freedoms may not, however, be excluded from the court's authority".* What is common to both the German and the Slovak Constitution? Both of them emphasize the rule of law.

A state that is governed by the rule of law protects the fundamental rights and freedoms of its citizens. The current jurisprudence considers that the results of that rule create the manner and the extent of implementation of state power. It also recognizes fundamental rights and freedoms (and also their protection) as one of the sources of state power and its implementation. Therefore all state authorities are addressees of the obligations arising from fundamental rights and freedoms. Consequently such obligations bind the state power within its establishment, its existence and within its implementation. This fact also greatly strengthens the normative dimension of human rights and fundamental freedoms. The consequence of this approach is reflected not only in the implementation of executive branches of state power, but also in relation to the judiciary and the legislative power. As far as this paper is concerned, the principles of lawfulness and human rights protection including the rule of restricted discretion mean within the field of public administration that the authorities must always consider whether their application of discretionary powers might contravene the purpose, essence and the content of fundamental rights and basic freedoms.[14] In any limitation of fundamental rights and freedoms, the legislature should take into consideration the constitutional orders and limits arising from other constitutional norms, and also (and in particular) from the constitutional principles, including the principle of legal certainty and proportionality.[15]

Constitutionally significant inadequacy in legal-application activities can beconsidered only if the applied legal norm gives the acting public authoritymargin for discretion in examining the conditions of a hypothesis and within the applicationof a particular form of disposition or penalty. In contrast, if the acting public authority does not have a margin of discretion created by a legal norm and if it is allowed to deduce a single possible legal consequence within the finding of the conditions of the hypothesis, then we can speak only about disproportionate legislation constituting the legal basis for action of public administration, but not about disproportionate law enforcement.[16]

3. The application of the principle of proportionality in the Slovak Republic

In any limitation of fundamental rights and freedoms the legislature must take into account the constitutional commands and limits arising from other constitutional norms, and also (and especially) the constitutional principles, including the principle of legal certainty and the principle of proportionality.[17]

[14] See also: WAGNEROVÁ, E. – ŠIMÍČEK, V. – LANGÁŠEK, T. – POSPÍŠIL, I. A KOL.: *Listina základních práv a svobod. Komentář.* Praha: Wolters Kluwer ČR, a. s. 2012, p. 21 – 23.

[15] See: Judgment of the Constitutional Court of the Slovak Republic of February 6th 2008, no. PL. ÚS 67/2007.

[16] See: Judgment of the Constitutional Court of the Slovak Republic of November 20th 2012, no. III. ÚS 575/2012.

[17] See: Finding of the Constitutional Court of the Slovak Republic of February 6th 2008, no. PL. ÚS 67/07.

The principle of proportionality forms an integral part of the general principle of the rule of law in the Slovak Republic. It is expressed in Article 1 (1), first sentence of the Constitution of the Slovak Republic. It is a fundamental constitutional principle. The Constitutional Court of the Slovak Republic uses it within its decisions, if there is a collision of fundamental rights. Therefore jurisprudence and legal practice consider it as an essential of constitutional balancing. The decision-making practice of the German Federal Constitutional Court has influenced the case law of the Czech Constitutional Court and also the practice of the Slovak Constitutional Court. The Constitutional Court of the Slovak Republic took over the German model of the three-step test of proportionality, under which it assesses conflicts of individual rights. The Constitutional Court of the Slovak Republic applies this test within the abstract review of constitutionality and also within the assessment of individual constitutional complaints (individuals may file them at the Constitutional Court of the Slovak Republic in cases where public authorities intervene and violate their fundamental rights or freedoms guaranteed by the Constitution of the Slovak Republic). The public authority must strictly apply the principle of proportionality in cases of conflicting rights. As a means for the application of this principle the public authorities use the proportionality test. This test has three steps. The first step (A) is the test of legitimate aim or effect, i.e. the test of suitability (or in German "Geeigneheit") – whether the intervention leads towards a goal that is important enough to justify the intervention; a test of rational links between the intervention and the objective of the intervention - whether by the means (restricting a certain right or freedom) it is possible to achieve an acceptable target. The second step (B) is the test of necessity (in German "Erforderlichkeit") – whether it was not possible to use some more considerate intervention. Finally, the third step (C) is the test of proportionality in the strict sense (in German "Angemessenheit"), which includes both (C1) practical consistency, that is the test of maximum preservation of both fundamental rights, and secondly (C2), the so-called Alexy weighing formula.[18]

When assessing the abstract review of constitutionality the Constitutional Court of the Slovak Republic focuses primarily on the approach of the legislature to the legislation in question. The Constitutional Court of the Slovak Republic in this case focuses on the fact whether the legislature has established the analyzed legislation on reasonable and objective grounds. The Constitutional Court of the Slovak Republic examines whether there is a legitimate aim of the legislator in such legislation. At the same time it evaluates whether between that objective and the means to achieve it a relationship of proportionality exists, and whether it is within the limits set by the Constitution of the Slovak Republic. A legitimate way does not necessarily have to lead to a legitimate aim. When changing the protected legal status the legislature must base its approach on the principle of proportionality inherent in the rule of law, so that the interference is constitutionally permissible. Above all this principle represents the appropriate relationship between the objective (purpose) pursued by the state and the means applied. In this context, the objective (purpose) observed by the state may be pursued; the means that the state uses may be used; the use of resources to achieve the purpose is appropriate; the use of resources to achieve the purpose is necessary and essential. The criterion or the principle of appropriateness means that a condition created by the intervention of the state, and the condition in which the observed objective should be seen, are in mutual respect; the objective must be consistent with the means of intervention. The criterion of necessity means that there is no other condition which can also created

[18] See: Finding of the Constitutional Court of the Slovak Republic of April 2nd 2008, no. II. ÚS 152/08.

without too much effort by the state and that is less burdensome to the citizen, and which relates to the situation in which the objective pursued must be considered to take place. In other words, the objective may not be achieved by equally effective but more burdensome means. In the case of large and complex law with the specific purpose that guarantees certain legal options to individuals, *the fact* that if the legislature subsequently introduces certain restrictive rules that are consistent with the original purpose as in the original conception of the law, but which were initially overlooked or were not evaluated (that is the legislature implements them as soon as it has a clear conclusion about the necessity of the rules from the application of the law) *cannot be invoked*, even if it will be favorable for someone who was favored by the original legislation.[19]

The object of protection afforded by the provision of Art. 1 (1) of the Constitution of the Slovak Republic consists of the constitutional principles and democratic values forming as a whole and in mutual links the concept of the substantive rule of law. The concept of the substantive rule of law emphasizes in relation to the legislator the requirement of respect for fundamental rights and freedoms in the context of normative regulation of social relations. Therefore all public authorities have a duty to ensure the real possibility of their application by the entities to which they have been granted. At the same time the concept of substantive rule of law also includes a requirement for quality of content and value in legal norms designed to ensure the adequacy of the remedies used in the selected legislative regulation, in relation to the legitimate aim of the legislature (the purpose of the regulation declared by the legislature) and compliance of chosen legislative measures with constitutional principles and democratic values generating the concept of substantive rule of law. The rule of law is not based on an apparent preservation of the law or on the formal respect of its content in a way that pretends the compliance of legally important facts to the law. The essence of the rule of law is located in placing the applicable law in line with the fundamental values of a democratic society, and consequently, in the consistent application of existing law, without exceptions based on private grounds.[20]

The principle of proportionality represents both a methodological concept for consideration in a collision of constitutionally protected values, but also a certain substantive significance which cannot be waived. This principle in fact contains the order to minimize interference with a fundamental right, with regard to the objective which it pursues.[21]

In the view of the mentioned principle, the restriction of fundamental rights must observe a legitimate aim, or at least a purpose that will survive with regard to the content of the constitutional provisions of the basic right. Therefore not every reason is relevant for restricting a fundamental right. It must be a reason which in the view of constitutional legislation may be granted similar relevance as that granted to the restricted fundamental right. In general, this objective will be another fundamental right or other public interest established by the Constitution of the Slovak Republic. In the next step it is essential to assess the actual restriction. This restriction must first succeed in terms of suitability (appropriateness). Therefore it must be appropriate to achieve the objective observed. The next assessment step must be the question of the necessity of this restriction. The essence of this step is to consider restrictions on the possible existence of other legal means in relation to that objective. The question of whether the

[19] See: Finding of the Constitutional Court of the Slovak Republic of April 24th 2001, no. PL. ÚS 3/00.

[20] See: Finding of the Constitutional Court of the Slovak Republic of July 11th 2012, no. PL. ÚS 13/2012.

[21] See: PERDUKOVÁ, V.: Princíp proporcionality v rozhodnutiach Ústavného súdu Slovenskej republiky. In: *Olomouc Young Lawyers Debates Collection of Papers (Olomoucké debaty mladých právníků Sborník příspěvků)*, issue: 1/2010, p. 6469, on www.ceeol.com.

objective cannot be achieved by other normative means which would restrict the fundamental right with lesser intensity must be answered. Finally, the last step is to assess proportionality in the strict sense, that is the assessment of the collision of standing constitutional values. In this case the fundamental right which is to be affected, and the basic rights of others or the public interest which are observed by the implementation of the restriction must be considered.[22]

Constitutionally significant inadequacy in legal-application activities may be considered only if the applied rule gives the public authority acting the space for discretion in examining the conditions of the hypothesis and applying a specific form of disposition or sanction. Conversely, if the acting public authority has no margin of discretion created by legal norm and at the same time it is obliged to draw a single conclusion in finding the conditions of its hypotheses, then we can speak only about disproportionate legislation forming the legal basis for the conduct of a public authority, and not about disproportionate law enforcement.[23]

4. Disclosure of information about public officials

The question of access to personal data on employees and officials of public authorities was dealt with in Slovak case law in the years 2009 – 2011. The Constitutional Court of the Slovak Republic assessed a public dispute between the right of access to information and the protection of personal data of the officials of public authorities. The Regional Court in Bratislava applied to the Constitutional Court of the Slovak Republic with a proposal of unconstitutionality of Article 9 (3) of Law no. 211/2000 Coll. on the Freedom of Information (hereinafter „Law no. 211/2000 Coll."). The content of this provision established the duty of the obliged person to disclose a set range of information on selected natural persons working for the public authorities.[24] The Regional Court in Bratislava was ruling on actions brought against the decision of the Slovak Ministry of Justice which rejected the applicant's request to disclose information on wage and salary conditions of selected officials and employees of the Ministry. Therefore the Regional Court in Bratislava followed the arguments of the Slovak Ministry of Justice and asked the Constitutional Court of the Slovak Republic to consider whether the mentioned provisions of Law no. 211/2000 Coll. were inconsistent with the Constitution of the Slovak Republic. The Regional Court in Bratislava argued that the entire group of persons referred to in the provisions of Law no. 211/2000 Coll. could not be considered as public persons just because they were paid from public funds. The Ministry of Justice of the Slovak Republic in its defence argued that its employees, particularly

22 See: PERDUKOVÁ, V.: ibidem, p. 6469, on www.ceeol.com.

23 See: Resolution of the Constitutional Court of the Slovak Republic no. III. ÚS 575/2012 of November 20th 2012.

24 Under Article 9 (3) of Law no. 211/2000 Coll. *"To inform the public the obliged entity shall make available the personal data of individuals that are processed by the information system under the conditions stipulated by a special law regarding natural persons who are officials, municipality representatives, introduced in the civil service, experts undertaking tasks for a member of the Government of the Slovak Republic, the President of the Slovak Republic, the President of the National Council of the Slovak Republic or the Deputy President of the National Council of the Slovak Republic, the head of personnel working in the public interest, an executive employee of an employer which is a public authority, an employment supervisor or a member of the evaluation committee or other similar body that participates in decision-making on the use of public funds. The first sentence shall disclose personal data in the scope ... a) title ... b) name, ... c) surname, ... d) position and date of appointment or nomination to the position, ... e) working induction and the date of commencement of professional activity, ... f) the place of performance of the work or activity, and authority in which the position or activity is conducted, ... g) wage, salary or emoluments, and other financial requirements for the performance of positions conferred or for the performance of jobs, if they are paid from the state budget or other public budget. "*

employees performing work in the public interest, considered the possibility of finding and disseminating information about them as a kind of punishment, or even as discrimination. The Slovak Ministry of Justice opposed the right of access to information, quoting the right of its employees to work under Art. 35 of the Constitution of the Slovak Republic.[25]

The Ministry of Justice considered the content of the provisions of Law no. 211/2000 Coll. as an expression of arbitrariness of the legislature and as an infringement of the essence of the rule of law. It argued that the restriction of fundamental rights was established directly by the law. *Therefore the Constitutional Court of the Slovak Republic examined the restriction of the basic right under Article 19 (3) and Article 22 (1) of the Constitution of the Slovak Republic*[26] *in view of the proportionality test.* The contested provision of Law no. 211/2000 Coll. pursues the purpose of disclosure to the public of information with respect to persons occupying positions in public authorities. Therefore the Constitutional Court of the Slovak Republic considered this purpose in the light of whether it would stand as a legitimate target for the restriction of the fundamental right or freedom guaranteed by the Constitution of the Slovak Republic. It dealt with the compliance of the purpose of informing the public with the fundamental right to information. The fundamental right to information under Article 26 of the Constitution of the Slovak Republic[27] was interpreted by the Constitutional Court of the Slovak Republic in the context of the democratic and legal character of the state, which is one of the fundamental principles expressed in Article 1 (1) of the Constitution of the Slovak Republic. This basic right constitutes – *together with the right to freedom of speech* – the constitutional guarantee of the existence of freedom and exchange of views, ideas, knowledge and information regardless of their relevance, usefulness, or content. The purpose of the right to information is not passed only to the level of freedom of creation and exchange of ideas in relation to public affairs, but it has a much wider reach touching diverse spheres of life of individuals and society. *A part of the right to information is undoubtedly the right to freely seek and obtain information.* This right also applies to information relating to or concerning the activities of the state or of any other entities performing the powers of the state.[28] Therefore the Constitutional Court of the Slovak Republic did not consider the

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[25] Under Article 35 of the Constitution of the Slovak Republic: „*(1) Everyone shall have the right to choose his or her profession and appropriate training freely, as well as the right to conduct entrepreneurial or other gainful activity. ... (2) A law may lay down terms of, or restrictions on certain professions or activities. ... (3) Citizens shall have the right to work. The State shall guarantee, within appropriate extent, the material welfare of those who cannot enjoy this right without their own fault. A law shall lay down the terms thereof. ... (4) A law may provide different regulation of the rights specified in paragraphs 1 to 3 with regard to aliens.*"

[26] Under Article 19 (3) of the Constitution of the Slovak Republic: *"Everyone shall have the right to be protected against unjustified collection, disclosure and other misuse of his or her personal data."* Under Article 22 (1) of the Constitution of the Slovak Republic: *"Secrecy of letters, other communications and written messages delivered by post and of personal data shall be guaranteed."*

[27] Under Article 26 of the Constitution of the Slovak Republic: *"(1) Freedom of expression and the right to information shall be guaranteed. … (2) Everyone has the right to express his or her opinion in words, writing, print, images or by other means and also to seek, receive and disseminate ideas and information freely, regardless of the state borders. No approval process shall be required for press publishing. Entrepreneurial activity in the field of radio and television broadcasting may be subject to permission from the State. The conditions shall be laid down by law. … (3) Censorship shall be prohibited. … (4) Freedom of expression and the right to seek and disseminate information may be restricted by law only if it concerns measures necessary in a democratic society to protect the rights and freedoms of others, national security, public order, protection of health and morals. … (5) Public authority bodies shall be obliged to provide information about their activities in the appropriate manner in the official language. The terms and form of the execution thereof shall be laid down by law."*

[28] See: Finding of the Constitutional Court of the Slovak Republic no. III. ÚS 169/03 of December 19th 2003; Finding of the Constitutional Court of the Slovak Republic no. I. ÚS 236/06 of June 28th 2007.

contested provision of Law no. 211/2000 Coll. to be controversial. This provision observes the purpose of the enforcement of the *right to information*. The Constitutional Court of the Slovak Republic, therefore, refused to grant the proposal of the Regional Court in Bratislava.

The Regional Court in Bratislava proposed giving priority to the rights under Art. 19 and 22 of the Constitution of the Slovak Republic, because the legislature included them in the separate section of the Constitution of the Slovak Republic entitled *"FUNDAMENTAL HUMAN RIGHTS AND FREEDOMS"*. The right to information is included in the Constitution of the Slovak Republic in the following section called *"POLITICAL RIGHTS"*. The Constitutional Court of the Slovak Republic could not agree with this statement, because the structure of the rights does not reflect their hierarchy. Both groups of rights in the same way guarantee the democratic character of the state and the rule of law. This approach stems from the legislative dimension of basic human rights, and thus from their relevance for public power in the rule of law.[29]

Fundamental rights and freedoms are equivalent to each other. The concept of substantive rule of law precludes the creation of a „hierarchy" of fundamental rights and freedoms. A hierarchy which would grant one fundamental right or freedom more importance than another fundamental right or freedom would be unconstitutional. Fundamental rights and freedoms may conflict. Any conflict within the system of fundamental rights and freedoms is resolved in the Slovak case law using the principle of fair balance.[30]

The purpose of the right to information is capable of producing conflict between the rights *under Article 19 (3) and Article 22 (1) of the Constitution of the Slovak Republic*. However, the Slovak case law considers it to be legitimate in terms of the principle of proportionality. The Constitutional Court of the Slovak Republic, therefore, carried out further criteria for assessing the proportionality of restrictions on fundamental rights *under Article 19 (3) and Article 22 (1) of the Constitution of the Slovak Republic*. In this regard, it noted that the explicit obligation to disclose information contained in the contested provision clearly allows the realization of the fundamental right to information. The Constitutional Court of the Slovak Republic in the next step also concluded the necessity of this provision. Its purpose is to make the specified data available to the public. For its fulfillment the duty to disclose the information comes into account. Subsequently, the Constitutional Court of the Slovak Republic examined whether the interest in disclosure of the information contained in the contested provisions outweighs with regard to its content and purpose the interests of persons affected by the disclosure of their salary conditions. *Resolution no. 1165 (1998) of the Parliamentary Assembly of the Council of Europe of June 26th 1998*[31] also applies to the issue of collision of the fundamental right to information with other fundamental rights connected with the private sphere of individual protection. The obligation to respect fundamental rights and freedoms of persons to whom the gathered information relates, including the right to privacy, the right to preserve human dignity, personal honor and name, as well as the right to protection against unauthorized collection, disclosure or

[29] See: WAGNEROVÁ, E. – ŠIMÍČEK, V. – LANGÁŠEK, T. – POSPÍŠIL, I. a kol.: *Listina základních práv a svobod. Komentář.* Praha: Wolters Kluwer ČR, a. s. 2012, p. 21 – 23.

[30] See: Finding of the Constitutional Court of the Slovak Republic no. PL. ÚS 22/06, of October 1st 2008.

[31] Under Art. 6. of Resolution no. 1165 (1998) of the Parliamentary Assembly of the Council of Europe

" *The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognize that the position they occupy in society — in many cases by choice — automatically entails increased pressure on their privacy.*"

other misuse of data about his person under Article 16, or otherwise under Article 19 of the Constitution of the Slovak Republic, also applies to the exercise of fundamental rights under Article 26 of the Constitution of the Slovak Republic. Therefore even public figures cannot be deprived of this right if they believe that due to the exercise of freedom of expression and the right to information the wrongful interference with some of their fundamental rights provided in Article 16 and Article 19 of the Constitution of the Slovak Republic has happened. *Public figures* may also have tools of protection at their disposal under civil law, or even criminal law. The valid legislation does not exclude them from such protection.[32] The Constitutional Court of the Slovak Republic in this way follows the case law of the European Court of Human Rights. That in its recent case law significantly expanded the concept of "freedom to receive the information" contained in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms,[33] when it explicitly recognized the existence of a *right of access to information.*[34]. The interpretation of the European Court of Human Rights in relation to the restriction of the right under Article 10 of the Convention is restrictive. *"In a democratic system, the acts and omissions of the government must be subject to closer examination by not only the authorities of legislative and judicial power, but also the media and public opinion."*[35] The question of salary conditions paid from public funds may pose significant interference with the rights to privacy of public officials. The border between the exercise of power and the private sphere of the persons concerned is not so clear. The question is whether the interest in disclosure of data relating to the income of the persons referred in the contested provisions from public sources outweighs the right of those individuals to protect their personal data. Right of access to information relates to information concerning the use of public funds. Broad public access to this information creates a space for public inspection of management of all subjects whose incomes are paid from public budgets, both in relation to their legality and effectiveness. This approach reflects the democratic character of the state. The part of the question of public funds also raises the issue of incomes of public officials or other persons which come from public budgets. Regarding these revenues, the law distinguishes between salaries, the amount of which may be inferred directly from the law, and the rewards decided by public officials. The contested provision therefore essentially affects only awards that create potential space for corrupt high-ranking state officials, or otherwise a specific form of ensuring their loyalty, as well as the possibility that the public officials who decide on the amount of awards abuse their position and powers. The disclosure of the amount of awards could have negative consequences for this sphere of public figures. Compared to

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32 Compare: Finding of the Constitutional Court of the Slovak Republic no. IV. ÚS 40/03 of September 23rd 2004.

33 Under Art. 10 of the Convention the Protection of Human Rights and Fundamental Freedoms: *"Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."*

34 See: The decision of the European Court of Human Rights of July 10th 2006, in the case of Sdružení Jihočeské Matky in the Czech Republic, application no. 19101/03; The decision of the European Court of Human Rights of April 14th 2009, in the case of Társaság a Szabadságjogokért v. Hungary, application no. 37374/06.

35 See: The decision of the European Court of Human Rights of February 12th 2008, in the case of Guja v. Moldavia, application no. 14277/04.

this aspect there is the public interest aspect of public scrutiny and transparency of public funds in terms of their legality and effectiveness, as well as the aspect of the preventive actions of such control.

The fundamental right to information serves in its essence as a barrier to the abuse of power by people involved in the exercise of public power. Effective control of public power is not real (effective) without the possibility of receiving information relating to the individuals who exercise this power. Public interest in information on the incomes of individuals referred to in Article 9 (3), first sentence, of Law no. 211/2000 Coll. also reflects the fact that information about regular and irregular (extra) incomes may have information value in terms of actual status and participation of these people in the decisions of public authorities. The case law underlines this fact especially with regard to social reality, when a significant number of managerial positions in state institutions, or institutions financed from public budgets, are occupied as a reflection of the current political situation. Persons involved in the exercise of public power must reckon with higher restrictions on their fundamental right to privacy. The amount of income derived from public budgets exceeds their personal rights, and is likely to be a matter of public interest or of public debate. The obligation to provide information does not apply to all persons who receive a salary from public funds, but only to enumerated public officials specified by law (high government officials), who are either managers or have a specific position to justify the greater intensity of interference in their right to privacy.

The assessment of proportionality in this case thus concerns only disclosure requirements in relation to such persons, and not to all employees of the state. Therefore the Constitutional Court of the Slovak Republic did not agree with the opinion of the Regional Court of Bratislava about *"unsubstantiated claims about the superiority of the political right to information over the fundamental human right to protection of personal data*" from the group of state employees. The Regional Court in Bratislava did not give in its reasoning any meaningful argument about why in terms of balancing the mutual collision of standing values the protection of the private data of the selected public officials should have more weight than the right to information about their income financed from public funds.[36]

5. Nature and landscape protection and its collision with property rights

Judgment of the Supreme Court of the Slovak Republic no. 3 Sžp 2/2008 of December 4th 2008 deals with the conflict of property rights and the interest in the protection of the environment in the process of public administration. The decision confronts the relationship of appropriateness of the administrative sanction and the public interest in the protection of nature and the landscape. The Slovak Environmental Inspectorate on June 7th 2007 confirmed the decision of the Environmental Inspectorate in Bratislava to impose a fine at the amount of 500 000 Slovak crowns on the applicant P. D. D. (hereinafter referred to as "the applicant") for the performance of activities that are prohibited in a protected bird area, because they may have a negative impact on the subject of protection. The applicant damaged the habitat of the protected species of the Great Bustard (Otis tarda) and the Red Falcon (Falco vespertinus).

His unlawful conduct, as a result of an administrative error, consisted in the action of ploughing plots no. "X" to no. "X" in administrative area no. "R" on November 8th 2005. These lands were part of the protected bird area S. P., to which the first level of protection within the meaning of

[36] See also: Finding of the Constitutional Court of the Slovak Republic no. PL. ÚS 1/09 of January 19th 2011.

Law no. 543/2002 Coll. on Nature and Landscape Protection (hereinafter referred to as "Law no. 543/2002 Coll.") applied. On August 3rd 2005 the applicant terminated the lease agreement regulating the use of these lands, which were temporarily used for the specific purpose of conservation, for an annual rent of 476 749 Slovak crowns. Therefore the administration asked the applicant to leave the lands in the existing condition in order to protect the habitat. On August 16th 2005 the first-instance administrative authority also began proceedings on imposing certain restrictions on the applicant´s property right under Article 4 (2) of Law no. 543/2002 Coll.

The administration explicitly imposed on the applicant some specific prohibitions and thereby restricted the ownership rights of the applicant. The property owned by the applicant was initially left by him to the State Nature and Landscape Protection Agency for temporary use. The applicant wanted the plots to be used for agricultural purposes and therefore to plough them, which he later did. But before that, on July 14th 2005 the first instance authority reminded the applicant that the proposed agricultural activity would be inconsistent with Law no. 543/2002 Coll. This law, together with the decree of the Ministry of Environment of the Slovak Republic no. 24/2003 Coll. implementing Law no. 543/2002 Coll. on Nature and Landscape Protection, considered these bird species to be species of European importance. The social value of the protected species of bustard at that time was of an amount estimated at 130 000 Slovak crowns. The social value of the protected species Red Falcon was 70 000 Slovak crowns.

After the sanction imposition the applicant filed an action at the Regional Court in Bratislava and opposed the inappropriateness of the sanction imposed. He also complained about insufficient findings of the case, insufficient reasoning of the fine and also about insufficient reasoning for the conclusions of the evidence and incorrect application of law to the facts. The Bratislava Regional Court concluded that the contested decisions were based on a proper assessment of the case. It also confirmed the legality and correctness of the proceedings of the administration. However, it considered the fine excessive and therefore the court reduced it to the amount of 50 000 Slovak crowns. The Regional Court in Bratislava obtained the opinion of the Central Office of the State Nature and Landscape Protection Agency, which concluded that the bustard occurs on the given lands all year round. This phenomenon happens mostly thanks to the grassland plots based here since 2001 (the so-called food and nesting habitat). The plots are also suitable as a habitat for the falcon. Similar conclusions were also expressed in their opinions by the Zoological Institute of the Slovak Academy of Sciences and the Austrian expert Mag. R. R., who identified the lands as part of one of the most important subpopulations of the western Pannonia Bustard population. Therefore the Regional Court of Bratislava held the conclusion that the administration did not take sufficiently into the account the property rights of the applicant.

However, the applicant was not satisfied with this judgment and appealed to the Supreme Court of the Slovak Republic. The applicant argued that the Regional Court in Bratislava violated the applicant's right to a fair trial. The defendant authority essentially persisted with its previous statements and did not propose a solution of the case to the Supreme Court of the Slovak Republic.

Therefore the Supreme Court of the Slovak Republic assessed the issue of collision of the property right with the interest in environmental protection expressed also in the Constitution of the Slovak Republic. In its opinion the interest in environmental protection was significant. This conclusion reflected mainly Article 44 of the Constitution of the Slovak Republic[37] establishing the right to a favorable environment and also Article 17 of Law no.

[37] Under Art. 44 of the Constitution of the Slovak Republic: *"(1) Everyone shall have the right to a favorable environment. … (2) Everyone shall have a duty to protect and improve the environment and to foster cultural heritage. … (3) No one shall imperil or damage the environment, natural resources and cultural heritage beyond*

17/1992 Coll. on the environment, which provides a general obligation of prevention in environmental protection.

Therefore the Slovak legal system pays increased attention to the right to a favorable environment in the event of a conflict with the exercise of certain rights of the individual. The above is evident in the case of a conflict with the public interest. For example, the right to property guaranteed by Article 20 of the Constitution of the Slovak Republic[38] represents such an individual right. Its protection is also increased in the system of administrative justice enshrined in Article 46 (2) of the Constitution of the Slovak Republic establishing the right to judicial and other legal protection.[39]

The Supreme Court of the Slovak Republic stated in its decision that, since 2003, Slovak Government Resolution no. 636 began proceedings for the declaration of a protected bird area on lands owned by the applicant. This power arises from Article 50 of Law no. 543/2002 Coll. Therefore the Supreme Court of the Slovak Republic disagreed with the reduction of the fine imposed. In our opinion, the Regional Court in Bratislava using the reduction of the fine favored the applicant's right of ownership over the right to a favorable environment. Therefore the Regional Court in Bratislava ruled unconstitutionally and at the same time it denied the right to a favorable environment. If the principle of proportionality creates an integral part of the rule of law, it also binds the court when ruling on the conflict of two constitutional rights. If the court does not proceed in the extent and manner prescribed by law, it breaches the content of the principle of lawfulness recognized by the Constitution, but also by international treaties.[40]

Article 13 (4) of the Constitution of the Slovak Republic creates another constitutionally enshrined corrective that in our opinion should have regulated the decision of the Regional Court in Bratislava. When imposing restrictions on fundamental rights and freedoms, respect must be given to the essence and meaning of these rights and freedoms and such restrictions must be used only for the specified purpose. The Regional Court in Bratislava in our opinion did not see a conflict with the right to a favorable environment, which is also reflected in the NATURA 2000 system. The reduction of the fine denied the very essence of the right to a favorable environment. The case law of the Constitutional Court of the Slovak Republic shows that the balance between public and private interest is an important

the limits laid down by law. … (4) The State shall care for economical exploitation of natural resources, for ecological balance and an effective environmental policy, and shall secure protection of specified sorts of wild plants and wild animals.". … (5) Details on the rights and duties according to paragraphs 1 to 4 shall be laid down by law."

38 Under Art. 20 of the Constitution of the Slovak Republic: *"(1) Everyone shall have the right to own property. Property rights of all owners shall be uniformly construed and equally protected by law. The right of inheritance is guaranteed. … (2) The law shall establish certain property which is necessary for the purposes of safeguarding the needs of society, the development of the national economy and the public interest, except the property defined in Art. 4 of this Constitution, as the exclusive property of the State, the municipality or specific legal persons. A law may also lay down which property only individual citizens or legal persons residing in the Slovak Republic may own. … (3) The ownership is binding. It shall not be misused causing injury to others or in contradiction with the public interests protected by the law. The exercise of right in property must not be detrimental to the health of other people, nature, cultural sites or the environment beyond the margin laid down by law. … (4) Expropriation or restrictions of the right to property may be imposed only to the necessary extent and in the public interest, based on the law and for a valuable consideration."*

39 Under Art. 46 (2) of the Constitution of the Slovak Republic: *"Any person who claims his or her rights to have been denied by a decision of a body of public administration may come to court to have the legality of the decision reviewed, save otherwise provided by law. The review of decisions in matters regarding fundamental rights and freedoms however shall not be excluded from the jurisdiction of courts."*

40 See: PROCHÁZKA, R.: *Lud a sudcovia v konštritučnej demokracii*. Plzeň: Aleš Čeněk, 2011, p. 33.

criterion for determining appropriateness of any restrictions on basic rights and freedoms. The legislator must therefore seek such legislation that establishes the correct proportions between constitutional values and fundamental rights and freedoms of natural persons and the effective achievement of the purpose of a specific law.[41] In our opinion the Bratislava Regional Court departed from that line of argument and emphasized the private interests of the landowner.

In our point of view the essence of the problem moved away from environmental issues. In that case, public authorities applied an administrative measure on the protection of NATURA 2000 system. However, the focus of the dispute between the applicant and the state remained preserved at the level of environmental law. The jurisprudence also points to issues of harmonious interpretation in European environmental law. Courts should consider whether their decisions will develop conflict between national law and obligations arising from European law.[42]

6. Measures restricting the freedom of assembly

The Constitutional Court of the Slovak Republic also analyses the nature of measures interfering with the freedom of assembly. The case law of this court always considers the proportionality of such measures. Therefore it bases itself on the fact that there is a possibility of interference with the freedom of assembly. This freedom is not considered to be an absolute right. The limits to it may be implemented only in a constitutionally conformal way. The limits must be set out by law. They must correspond to a certain and legally established purpose. It also must be indispensable in a democratic society to follow the established purpose. Therefore only a social need and a balanced relation between the tools used and the aim followed may excuse interference with the freedom of assembly. The freedom of assembly and the freedom of expression (established within it) belong among the basic values of democratic society governed by the rule of law. Article 28 of the Constitution of the Slovak Republic prohibits preconditioning the use of this right by permission issued by the public authorities.[43]

The feasibility of interference with this freedom is dependent on the purpose of the assembly. The authority has to consider the fact whether the assembly tends or calls for direct or indirect endangerment of specific rights connected with specific persons or social groups. Therefore the legislature enables the authorities to interfere with this freedom in cases when an organized assembly leads to some constitutionally prohibited purpose. The courts in such cases argue using the principle of the rational legislator. According to this rule the legislation is based on certain and expected standards. In the view of the freedom of assembly such standards are represented by compliance of the real and the proclaimed purpose of the assembly. In other words when adopting legislation on the freedom of assembly the legislator does not force the authorities to presume that the notified purpose of the assembly and real one would be in contradiction. In its opinions the case law goes further. The influence of the principle of the rational legislator expresses its content also in the fact that even discrepancy of these purposes does not automatically establish the possibility of

41 See: Finding of the Constitutional Court of the Slovak Republic no. PL. ÚS 15/03-39, of February 11th 2004.

42 See: LAVRYSEN, L.: Application of European Enviromental Law by National Courts. In: *The impact of ECJ jurisprudence on environmental law.* Budapest: Akaprint Kft. 2009, p. 137.

43 See: Finding of the Constitutional Court of the Slovak Republic no. I. ÚS 193/03 of March 30th 2004.

prohibiting the assembly. The authority does still have an obligation to analyze whether the real purpose of the assembly is prohibited by law. The fact that the person convening the assembly pretends a false purpose of the assembly does not necessarily mean that its true aim disrespects the requirements of the legislation.[44]

7. Legality of evidence and restricted discretion

According to Article 2(2) of the Constitution of the Slovak Republic (hereinafter "the Constitution"), *"the state authorities may act solely on the basis of the Constitution, within its scope, and their actions shall be governed by procedures laid down by law"*. This provision follows the content of Article 1 of the Constitution, under which *"the Slovak Republic is a sovereign, democratic state governed by the rule of law. It is not bound to any ideology or religion. The Slovak Republic acknowledges and adheres to general rules of international law, international treaties by which it is bound, and its other international obligations"*. The content of these provisions also includes specification of the method of applying discretionary power in certain legal situations. Within a state ruled by law, there is always a conflict between human rights protection and unlimited administrative discretion. From human rights protection derives the theory of the principle of proper execution of public power.[45] However, the problem of administrative discretion is complex. It is true that in any intensive form of government, the government cannot function without the exercise of some discretion. It is necessary not only for the individualization of administrative power but also because it is humanly impossible to lay down a rule for every situation within society. But it is equally true that absolute discretion is a ruthless master who is able to destroy rights and freedoms. Therefore there has been constant conflict between the claims of the administration to absolute discretion and the claims of subjects to reasonable exercise of it. Discretionary power gives much room for misuse. Therefore theremedy lies in tightening the procedure and not in abolishing the power itself.[46]

So the question is, where do the limits of discretion lie, or better to say, how to recognize them? In my opinion the restriction of discretion begins at the point in which the public authority unlawfully interferes with a specific human right or freedom. An example lies also within the case-law of the Constitutional Court of the Slovak Republic. A few years ago the Constitutional Court ruled on the use of traffic radar traps. The complainant claimed that the use of traffic radar traps falls within the provisions which regulate the use of data retention and electronic discovery under Law no. 166/2003 Coll. on protection of privacy against unauthorized use of informative and technical devices (hereinafter the "Privacy Law"). Therefore there may have been a discrepancy between the traffic police department actions and the constitutional rights of the complainant, when the police used a traffic radar trap in an unannounced way and the complainant as a driver could not legitimately

[44] See: the Judgment of the Supreme Administrative Court of the Czech Republic of March 31st 2008, no. 8As 7/2008.

[45] See also : SKULOVÁ, S. K vývoji soudního přeskumu správního uvážení s akcentem na některé problémy spojené s rozsahem a obsahem přeskumu správního uvážení ve správnem soudnictví. In: MASLEN, M.: *Správne súdnictvo a jeho rozvojové aspekty*. In: Maslen, M.: Správne súdnictvo a jeho rozvojové aspekty. In: *Zborník príspevkov vedeckej konferencie s medzinárodnou účasťou konanej 7. – 8. marca 2011 v Trnave*. Bratislava: IKARUS.SK – EUROUNION. 2011. s. 261.

[46] See: ABUSE OF ADMINISTRATIVE DISCRETION. Available at the webpage: http://www.legalservicesindia.com/article/article/abuse-of-administrative-discretion-756-1.html; March 14th 2014, 13:29 CET.

expect the use of such a device. The question of the case was whether there was a margin for discretion of the public authority, or in other words whether the use of traffic radar traps falls within the use of electronic discovery, data retention and authorized use of informative and technical devices that could possibly harm the privacy of a driver in road traffic? Under Article 19 of the Constitution *"Everyone shall have the right to maintain and protect his or her dignity, honor, reputation and good name. Everyone shall have the right to be free from unjustified interference in his or her private and family life. Everyone shall have the right to be protected against unjustified collection, disclosure and other misuse of his or her personal data."* The Privacy Law lays down the conditions for the use of informative and technical devices without the prior consent of the person whose privacy the public authority interferes with (Article 1(1)). According to the case law the Privacy Law also sets out the conditions for the use of such devices, which are: *1. required technical characteristics; 2. method of use 3. purpose of use; 4. interference with the privacy of a person; 5. exhaustively determined range of state agencies authorized to use the road speedometer; 6. use of road speedometer in the range under a special regulation, which in the case of the police is the Police Law.* The complainant as a driver found himself in an administrative relationship to the police. As a participant in the road traffic his privacy was restricted because the road traffic is of public nature, and it is always controlled by an interest in its safety and fluency. The purpose of road speedometer usage is primarily focused on vehicle speed monitoring, not on finding information on matters directly related to the sphere of the private life of the vehicle driver.[47]

Conclusions

The possibility established by law to apply discretionary power by the state authorities cannot mean unlimited and materially unreviewable arbitrariness. In fact such arbitrariness would be contrary to the rule of law. It would result in unpredictability of actions and decision-making by the state authorities, and thus in a constitutionally unacceptable degree of legal uncertainty.[48] That is to say, every action or decision made by a public authority must comply with the principles of the rule of law, particularly with the principle of legal certainty and predictability of actions and decision-making of public authorities. In any case the reasons of an action or decision of a public authority must be sufficiently clear, certain and obvious. They must clearly illustrate the considerations of the administration (creating the discretionary power) which govern the application of each legal norm. They must also include the material requirements that the law imposes on the public authorities as well as on private individuals.[49] Therefore every application of discretionary power has to have a legal basis, it must legitimate and necessary, and it also has to have proportional intensity.

In conclusion, the question arises as to the significance of the principle of proportionality in public administration Under Article 5 of the Recommendation CM/Rec (2007)7 of the Committee of Ministers to member states on good administration: *"Public authorities shall act in accordance with the principle of proportionality. They shall impose measures affecting the rights or interests of private persons only where necessary and to the extent required to achieve the aim pursued. When exercising their discretion, they shall maintain a proper balance*

47 See: Judgment of the Constitutional Court of the Slovak Republic of September 3rd 2008, no. III. ÚS 264/2008.
48 See: Judgment of the Constitutional Court of the Slovak Republic of June 30th 2011, no. II. ÚS 117/2011.
49 See: Judgment of the Supreme Court of the Slovak Republic of December 8th 2009, no. 1Sžo/269/2008.

between any adverse effects which their decision has on the rights or interests of private persons and the purpose they pursue. Any measures taken by them shall not be excessive." The principle of proportionality means therefore helping to find a fair balance between the objective and the means employed. In practice, this rule applies when a conflict of public and private interests arises. The legal significance of the principle of proportionality lies in the fact that it serves as a guide when public administration exercises its powers and interferes with the individual rights or freedoms of a private person. The same principle also answers the question about what can be considered a reasonable and excusable degree of intervention justified by the public interest.[50] The application of intervention in the private sphere of the individual should be in accordance with the principle of proportionality. Therefore, when deciding on such intervention the administrative authority should ensure that it is minimal. The administration should also avoid any unjustified duration of such intervention. Any decision which significantly interferes with the rights of the individual must therefore be based on suchevidence which accurately and completely determines the real state of affairs.[51]

Súhrn
Primerané opatrenia prijímané orgánmi verejnej moci vo verejnej správe na Slovensku

Právne princípy spravidla definuje právna teória. V tomto smere slúžia ako interpretačný nástroj. Zásadný vplyv na tvorbu princípov má však aj súdna judikatúra, a predovšetkým judikatúra Európskeho súdu pre ľudské práva, ktorý aplikuje záruky ochrany práv jednotlivcov vyplývajúce z Dohovoru o ochrane ľudských práv a základných slobôd. Na druhej strane právne princípy môžu slúžiť ako pramene práva. Podstatný význam na rozvoj princípov v tomto zmysle má predovšetkým rozhodovacia činnosť Súdneho dvora Európskej únie. Všetky uvedené tézy vychádzajú z názoru, ktorý odmieta existenciu nedokonalosti právneho systému a situácie, za ktorej právna úprava ochrany práv jednotlivca „mlčí". Princípy v Európskom právnom priestore sú preto v prvom rade pravidlá spoločné všetkým právnym poriadkom. To tejto skupiny zaraďuje právna teória pravidlá zahŕňajúce vládu práva a viazanosť právom, právnu istotu, legitímne očakávania a proporcionalitu. Inú skupinu tvoria princípy odvodené z niektorých právnych poriadkov kontinentálnej Európy. Tie súvisia najmä so zodpovednosťou verejnej moci za prijímané opatrenia a zásadný význam na ich tvorbu mali predovšetkým nemecký a francúzsky právny poriadok. Niektoré princípy však môžu byť špecifické iba pre oblasť Európskej únie, ako napr. prednosť európskeho práva. Spoločným menovateľom princípov však sú vždy úlohy ako zapĺňanie medzier v práve, interpretácia práva, priestor pre súdny kontrolu verejnej správy a limitácia verejnej moci. Vo všeobecnosti môžeme povedať, že princípy slúžia na posudzovanie zákonnosti legislatívnych a administratívnych opatrení, ktoré prijímajú orgány verejnej moci. Takým nástrojom je aj princíp proporcionality, ktorý vyžaduje, aby použité prostriedky boli adekvátne dosahovanému účelu. Prijímané opatrenia musia smerovať k dosiahnutiu rovnováhy medzi verejným a súkromným záujmom a zasahovať do práv jednotlivca iba v nevyhnutnej miere. Tieto požiadavky zdôrazňuje čl. 5 Odporúčania

[50] See: KOŠIČIAROVÁ, S.: *Princípy dobrej verejnej správy a Rada Európy*. Bratislava: IURA Edition, spol. s r. o., 2012. p. 44 – 45.

[51] Compare: The judgment of the Supreme Court of the Slovak Republic of June 14th 2011, no. 1 Sža 23/2011.

CM/Rec (2007) 7 Výboru ministrov členským štátom o dobrej verejnej správe, čl. 52 Charty základných práv EU, ale aj doktrína štrasburských orgánov ochrany práv založená na výklade Dohovoru o ochrane ľudských práv a základných slobôd. Všetky spomenuté dokumenty sa zameriavajú najmä na diskrečnú právomoc verejných orgánov a predpokladov jej súdnej kontroly. Potvrdzujú, že závery, resp. opatrenia verejných orgánov založené na diskrečnej právomoci musia mať svoj základ v práve, musia byť realizované a posudzované zákonným spôsobom a musia zohľadňovať všetky skutkové okolnosti posudzovaného prípadu. Tieto požiadavky princípov viazanosti právom a proporcionality majú svoje „korene" najmä v nemeckej súdnej judikatúre. Zdôrazňujú, že použitie diskrečnej právomoci musí striktne zohľadňovať kritériá ustanovené právnou úpravou a musí byť založené na ich vyhodnotení. Verejné orgány preto musia vždy zohľadniť požiadavku, aby ich úkony a opatrenia nepopierali zmysel, podstatu a obsah základných práv a slobôd. Obmedzenia základných práv a slobôd vyplývajú výlučne z ústavných noriem a sú založené najmä na princípoch právnej istoty a proporcionality. V spoločnosti bude vždy existovať spor medzi ochranou ľudských práv a neobmedzenou diskrečnou právomocou. Na druhej strane však z ochrany ľudských práv odvodzuje právna teória ideu riadneho výkonu verejnej moci. Zároveň verejná správa nemôže existovať bez určitého stupňa diskrečnej právomoci, ktorá jej umožňuje použitie moci individualizovať v konkrétnom prípade. Otázkou však je, kde sú hranice jej použitia a kedy sú opatrenia a úkony verejných orgánov ešte primerané? Hranice použitia správnej úvahy začínajú v bode, v ktorom orgán verejnej moci nezákonne zasahuje do konkrétneho ľudského práva alebo slobody. Ľubovôľa uváženia by mohla spôsobiť nepredvídateľnosť činností a rozhodovania orgánov verejnej moci, a teda zapríčiniť ústavne neprijateľnú mieru právnej neistoty.

Peter Vyšný

Einige Bemerkungen zum Lehrbuch *Allgemeine Rechtsgeschichte* von Juan Pablo Pampillo Baliño

Einführung

Der wissenschaftlichen und pädagogischen Disziplin "Allgemeine Rechtsgeschichte" wird manchmal zum Vorwurf gemacht, dass sie bloß eine einfache Juxtaposition der jeweiligen *nationalen* Rechtsgeschichten sei, wobei sie eher eine systematische Untersuchung und Auslegung einer *gemeinsamen* juristischen, sozialen, ökonomischen, politischen, ideologischen und kulturellen Basis dieser Geschichten sein sollte. Unter einer allgemeinen Rechtsgeschichte kann man nämlich *mehr* als ein Panorama von individuellen Entwicklungen verschiedener nationaler Rechtsordnungen verstehen. Die Rechtsentwicklung respektierte die ethnischen, kulturellen oder politischen Grenzen im gewissen Maße *nicht* und verlief auch auf einer transregionellen, transnationalen und sogar auch transkontinentalen Ebene, was zur Entstehung von weltlichen *überstaatlichen* Rechtskulturen (von sog. großen Rechtssystemen oder Rechtstraditionen) führte.

Die hier skizzierte, sozusagen *tiefere und komplexere Auffassung der Allgemeinen Rechtsgeschichte*, ist nicht völlig neu. Die deutschen Rechtswissenschaftler und Rechtshistoriker wie Heinrich Ahrens (1808 – 1874) und Joseph Köhler (1849 – 1919) haben seit der zweiten Hälfte des 19. Jhs. auf die Notwendigkeit einer *universellen* Rechtsgeschichte hingewiesen, die etwas später auch Heinrich Mitteis (1889 – 1952), ein weiterer hervorragender Rechtsgelehrte, durchzusetzen versuchte. Jedoch sind bis in die Gegenwart nicht viele wissenschaftliche Monographien, die sich dem Konzept der universellen Rechtsgeschichte nähern, entstanden, obwohl die Werke, die erschienen sind, wie z. B. die Werke von Franz Wieacker (1908 – 1994) und Helmut Coing (1912 – 2000), ohne Zweifel als quasi definitive Synthesen mit einer paradigmatischen Bedeutung zu betrachten sind.

Im Gegenteil zu einer beschränkten Anzahl von *komplexen wissenschaftlichen* Arbeiten über die Allgemeine Rechtsgeschichte ist die mit dieser Problematik sich befassende (juristische) *Studienliteratur* umfangreich. Einer der neuesten Titel dieser Literatur ist das Lehrbuch *Allgemeine Rechtsgeschichte*,[1] dessen Autor Dr. Juan Pablo Pampillo Baliño (*1974) ein international anerkannter mexikanischer Rechtsphilosophe, Rechtstheoretiker und Rechtshistoriker ist. Im folgenden Text wird Baliños interesantes und zu einem großen Teil originell konzipiertes Lehrbuch kurz charakterisiert.

Lehrbuch *Allgemeine Rechtsgeschichte*

In der Vergangenheit existierte das Recht natürlicherweise nicht „im Vakuum", sondern in einem sozialen und kulturellen Kontext, der neben dem historischen Recht ein wichtiges Objekt der rechstgeschichtlichen Forschung und Lehre ist. Unter Rechtshistorikern herrscht

[1] PAMPILLO BALIÑO, J. P. *Historia general del derecho*. México: Oxford University Press, 2008.

jedoch kein Einvernehmen über das Maß, bis zu welchem im rechtshistorischen Diskurs dieser extralegale Kontext studiert werden soll. So existieren rechtsgeschichtliche Arbeiten und Lehrbücher, die (grob gesagt) "mehr historisch" oder „mehr juristisch" orientiert sind. Baliños Lehrbuch gehört zu den „mehr juristisch" orientierten rechtsgeschichtlichen Werken. Der Schwerpunkt seiner Auslegungen ist das Recht als solches. Ihre Achse ist die Rechtsentwicklung, die Baliño mit Rücksicht auf verschiedene soziale, politische, kulturelle und ideengeschichtliche Faktoren, bzw. ihre historischen Transformationen schildert.

Ein Spezifikum des Lehrbuches ist das seriöse Bestreben des Autors, die ganze Rechtsentwicklung aus einer (rechts)philosophischen Perspektive systematisch zu betrachten. Der Autor hat die Materie der allgemeinen Rechtsgeschichte mit philosophischen Mitteln so komplex erfasst, dass seine theoretischen und methodologischen Ausgangspunkte, seine Auslegungen des Verlaufs der allgemeinen Rechtsgeschichte, seine Korelationen der Entwicklung des Rechtsdenkens mit dieser Geschichte, sowie auch die Schlussfolgerungen, die er gezogen hat, weit über die Standards eines rechtsgeschichtlichen Lehrbuches hinausgehen.

Baliños Lehrbuch ist eine ausführliche und in die Tiefe gehende Auslegung der höchst komplizierten Entwicklung der sog. *westlichen Rechtstradition* (mehr zu diesem Begriff siehe unten). Die Auslegung stützt sich auf eine reiche Bibliographie und ist keinesfalls lediglich eine einfache Beschreibung oder Zusammenstellung von Fakten; sie ist zu einem großen Teil auch eine *Analyse*, durch die Baliño zu neuen Erkenntnissen gekommen ist. Diese deskriptiv–analytische Vorstellung von historischen Entwicklungen der westlichen Rechtstradition legte Baliño nicht nur als ein didaktisches Material vor, sondern benutzte sie originell in seinem Lehrbuch auch zur *Diagnose* der Gegenwart der westlichen Rechtstradition und zur *Prognose* ihrer Zukunft. Zusammenfassend kann man sagen, dass Baliños Lehrbuch eine systematische philosophische *Reflexion* der Entwicklung der westlichen Rechtstradition seit der griechisch-römischen Antike bis in die europäische Gegenwart ist, mit deren Hilfe der Autor zeigte, das der rezente Zustand der westlichen Rechtskultur, vor allem dank der Erschöpfung der Doktrin des Rechtspositivismus, krisenhaft sei und eines neuen intelektuellen Grundes bedürfe. Laut Baliño sollte dieser Grund mit den einzigartigen, im Laufe der Geschichte hervorgekommenen menschlichen Experienzen, mit dem Recht bzw. mit der Ordnung und Gerechtigkeit, aus der philosophischen (universelle Essenz des Rechts), kulturologischen (Recht als konkrete Kultur bzw. Tradition) und soziologischen (Recht als soziale Realität) Rechtsauffassung sowie auch aus der rechtswissenschaftlichen Dogmatik aufgebaut werden.

Es ist ganz verständlich, dass der Autor am Anfang seiner Auslegung für nützlich gehalten hat, das *Recht*, also einen der Schlüsseltermine des gesamten Lehrbuches, zu definieren. Nach eigenen Worten betrachtet er das Recht *global*, wobei er auf diese Betrachtungsweise in einer selbstständigen Publikation[2] ausführlicher als in seinem Lehrbuch eingegangen ist. Baliños globales Rechtsverständniss beruht auf der gleichzeitigen Berücksichtigung bzw. Untersuchung von zwei dialektisch verbundenen Aspekten des Rechts. Der erste Aspekt ist die (rechts)philosophisch fassbare *Essenz des Rechts* (Ontognoseologie des Rechts), die auf einem hohen Verallgemeinerungsgrad beruht und universell bzw. transhistorisch ist (Recht = eine den Gerechtigkeitsprinzipien entsprechende Ordnung im menschlichen Zusammenleben u. ä). Der zweite Aspekt ist die von der Rechtsgeschichte, den Rechtswissenschaften sowie auch einigen anderen

[2] PAMPILLO BALIÑO, J. P. *Filosofía del derecho. Teoría global del derecho.* México: Porrúa, 2005.

Sozialwissenschaften (z. B. von der Soziologie) fassbare faktische *Existenz des Rechts* in der menschlichen Gesellschaft (Phänomenologie des Rechts), die unter anderem diachronisch zu beschreiben sei (das Recht als realer/sozialer Fakt entwickelt sich, d.h. es wandelt sich im Laufe der Geschichte um). Baliño sieht die Essenz des Rechts als eine objektive Gegebenheit, die das *Vorverständniss des Rechts* im Sinne der philosophischen Hermenuetik ermöglicht, das weiterhin bei der Analyse und Interpretation der realen bzw. sozial-historischen Existenz des Rechts benutzt wird. Auf der anderen Seite sieht er in der existenzialen Dimension des Rechts ein Mittel, das die Essenz des Rechts begreifen hilft. Anders gesagt, Baliño versuchte in seinem Lehrbuch die diachronische Existenz des Rechts (*in concreto* die Entwicklung der westlichen Rechtstradition) aufgrund der *vor*verstandenen Essenz des Rechts (bzw. der Essenz der westlichen Rechtstradition) zu erklären und gleichzeitig die Essenz des Rechts aufgrund der Existenz des Rechts näher zu erläutern. Er betrachtete also die Existenz des Rechts durch seine Essenz *et vice versa*, was er als *Methode der doppelten Rückkehr (reditio)* bezeichnete (auf einer gedanklichen Ebene „kehrte" er von der Essenz des Rechts zu seiner Existenz zurück, um danach von der Existenz des Rechts zu seiner Essenz zurückzukehren).

Ein weiterer Schlüsseltermin bzw. der Hauptgegenstand des Lehrbuches ist die *westliche Rechtstradition*. Baliño definiert sie ziemlich einfach (aber treffend) als eine Rechtstradition a) deren Substrat die römische Jurisprudenz ist; b) die sich im europäischen *ius commune* zum ersten Mal formiert hatte; und c) deren aktuelle Evolution vor allem Ergebnis der Diffusion der Rechtskodifikationsidee ist.

Baliño untersucht die Geschichte der westlichen Rechtstradition mit einer Methode, die die faktischen wie auch die rechtlichen Entwicklungen ausgewogen berücksichtigt, wobei er auch mit speziellen analytischen bzw. explikativen Paar - Konzepten arbeitet, die gewisse gegensätzliche bzw. komplementäre innere Charakteristika bzw. Tendenzen der westlichen Rechtstradition plastisch darstellen. Konkret handelt es sich um folgende Paar – Konzepte:

a) *auctoritas* (= eine informelle Machtausübung durch z. B. Empfehlungen, die zwar unverbindlich, aber im Umkreis einer angesehenen Person, die sie erteilt, mehr oder weniger respektiert sind) und *potestas* (= eine formelle Machtausübung durch vor allem verbindliche, d.h. erzwingbare Rechtsregel, denen ihre Adressaten ihr tagtägliches Verhalten unterordnen müssen);
b) die *Topik* (= Recht als Sammlung von Lösungen konkreter Rechtsfälle; induktiv, d.h. aus der gesellschaftlichen Realität enstandenes Recht usw.) und die *Systematik* (= Recht als System von Rechtsnormen, die deduktiv in der gesellschaftlichen Realität angewandt werden usw.);
c) *interpretatio* (= Untersuchung des Rechts als soziale Realität) und *hermeneusis* (= Untersuchung des Rechts als kulturelle Realität bzw. Tradition);
d) *die Pluralität oder das Defizit von Rechtsquellen* als Indikatoren der Komplexität oder Simplizität von konkreten historischen Rechtsordnungen; und
e) die *Justiz* und die *Ordnung* als zwei historische Hauptexperienzen der Leute mit dem Recht.

Nach der Exposition der im vorherigen Text nähergebrachten theoretischen und methodologischen Ausgangspunkte des Lehrbuches setzte Baliño mit einer ausführlichen Auslegung der Entwicklung der westlichen Rechtstradition fort. Es würde viel Zeit und Raum in Anspruch nehmen, diese Auslegung hier systematisch zu reproduzieren. Darum beschränke ich mich im Weiteren bloß auf eine chronologisch geordnete Enumeration

von Haupthemen, die Baliño bearbeitete und hoffe auf diese Art und Weise dem Leser eine genügende, wenn auch nur skizzenhafte Information über den Inhalt des Lehrbuches zu geben. Es geht um folgende Hauptthemen: klassisches Substrat der westlichen Rechtstradition (altgriechische Idee des Rechts, römische Jurisprudenz); das mittelalterliche Recht in Europa, seine Entwicklungen und Heterogenität, und die Entstehung und der Charakter von *ius commune*; die neuzeitliche Evolution des Rechts vom rationalen Rechtsnaturalismus über das Zeitalter der Verbreitung der Kodifikationsidee bis zur Dogmatik eines legalistischen, formalistischen und voluntaristischen Rechtspositivismus, die mit dem Rechtsdenken von Hans Kelsen (1881 – 1973) kulminierte; die rezente Krisis bzw. Degeneration des Rechtspositivismus, d.h. des dominierenden Rechtsverständnisses und der Rechtsdogmatik, und einen Schritt zu deren Überwindung im Rahmen des europäischen Rechts, das Baliño als neues *ius commune* und als Recht, das sich der positivistichen Rechtsauffassung deutlich entzieht, betrachtet.

Wie bereits erwähnt wurde, wagte es Baliño, in seinem Lehrbuch auch die Zukunft der westlichen Rechtstradition zu prognostizieren. Er ist von der Erschöpfung der Doktrin des Rechtspositivismus überzeugt, da die rezenten Entwicklungen, u. a. das Phänomen der Globalisierung und verschiedener überstaatlicher Integrationsprozesse, diese Doktrin wenn auch nicht komplett negiert, mindestens in beträchtlichem Maße in Frage gestellt haben. Man kann Baliño beistimmen, dass die Thesen des Rechtspositivismus problematisch geworden sind. Das Gesetz ist nicht mehr die einzige Rechtsquelle bzw. Rechtsform, der Nationalstaat ist nicht mehr der exklusive Gesetzgeber, die „metajuristischen" Tatsächlichkeiten sind kaum aus dem Blickwinkel der Rechtswissenschaft auszuschließen usw. Baliño empfiehlt diese krisenhafte Situation mit der Schaffung einer *neuen Rechtsdogmatik*, deren einige bereits existierende Grundzüge er u. a. in der Tätigkeit des luxemburgischen Gericht der Europäischen Union sieht, zu bewältigen. Laut Baliño sollte diese neue Rechtsdogmatik hauptsächlich:

- global sein (d. h. sie sollte die Relevanz für die gesamte westliche Rechtstradition als ein überstaatliches Ganzes haben);

- auf einem komplexen Rechtsverständniss beruhen, das sich nicht auf die Identifizierung des Rechts mit geltenden Rechtsordnungen reduziert, sondern auch den extralegalen, sozialen und kulturellen Kontext des Rechts sowie auch die höchst komplizierte, pluridimensionale Essenz und Existenz des Menschen als Urheber und Adressaten des Rechts berücksichtigt;

– akzeptieren, dass die heutige Situation dem sog. Rechtspluralismus entspricht, woraus sich ergibt, dass das Gesetz nicht mehr die Rechtsquelle, in der man *exklusiv* die Lösungen von Rechtsfällen finden könnte, sei;
– das Recht sollte aus der Sicht der Topik sowie auch der Systematik untersucht werden, was nötig sei, da die heutigen okzidentalen Rechtsquellen sehr verschiedenartig sind und ihre Verbindlichkeit genauso aus *auctoritas sapientes* wie aus *potestas imperium* hervorgehen könne;
– auf einer rationellen Kombination von *hermeneusis* der (westlichen) rechtlichen Tradition (Entwicklung) und von *interpretatio* der aktuellen sozialen Situation bzw. ihrer Probleme basieren, was zu einer effektiven Ausnutzung der im Laufe der Geschichte entstandenen, reichen Experienzen mit dem Recht in der heutigen Rechtswissenschaft und Rechtspraxis führen würde.

Schlussbemerkung

Baliños Lehrbuch *Allgemeine Rechtsgeschichte* zeigt sehr überzeugend, dass der beschwingte Satz *historia magistra vitae est* nicht unbedingt eine hohle Phrase sein müsse. Es ist ein exzellentes Beispiel einer großen *Utilität der (allgemeinen) Rechtsgeschichte*, deren systematische Kenntnis – und dies hat Baliño außer allem Zweifel bewiesen – zum Begreiffen der *aktuellen* Probleme im Rechtsleben der okzidentalen Welt, sowie auch zu ihrer effektiven Lösung *nötig* ist. Die Entwicklung der westlichen Rechtskultur ist außerordentlich reich an rechtsphilosophischen Theorien, Rechtsquellen, Rechtskonzepten, Rechtsinstitutionen und konkreten menschlichen Experienzen mit dem Recht, von denen viele noch nicht „tot" sind, sondern explizit oder implizit in der *heutigen* Rechtskultur anwesend sind, und/oder ein Potenzial haben, ein in der rechtlichen *Gegenwart* extensiv ausnutzbares „Reservoir" an historisch bewährten Rechtslösungen zu sein.

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Veronika KLEŇOVÁ: *Substitutio vulgaris und die Testierfreiheit im römischen Recht. Das Institut der Vulgarsubstitution in den Quellen des römischen Rechts mit Schwerpunkt auf justinianischen Digesten*. Plzeň: Verlag Aleš Čeněk, GmbH, 2013, 206 S. ISBN 978-80-7380-410-7

Autorin der vorliegenden wissenschaftlichen Monographie zählt zwar zu den jungen Romanisten, doch ihre wissenschaftliche Erstlingsarbeit zum Thema des Instituts der Vulgarsubstitution, die einstmals an der Juristischen Fakultät der Universität zu Trnava als Dissertationsarbeit vorgelegt worden war, wurde endlich, sachlich vervollkommnet und überarbeitet, herausgegeben. Zuerst ist es angebracht, die grundlegenden Rechtsfragen zu qualifizieren, mit denen sich die Autorin abgegeben hat: Umfang und Maß der Testierfreiheit für den Todesfall mittels Vulgarsubstitution und Schutz des Willens des Erblassers (Testators) bei der Bestimmung der grundlegenden materiellen Bedingung eines gültigen und wirksamen Testaments (und nach seinem Muster auch aller Rechtsgeschäfte *mortis causa*) – *institutio haeredis*. Die erste Frage betrifft sozusagen die grundlegende materielle Seite des Erbrechts der Testierfreiheit und bei der zweiten handelt es sich um die Interpretation des Willens des Verstorbenen. Die Autorin hat in ihrer Monographie einen wissenschaftlichen Plan zu einer Analyse der angeführten terminologischen, philosophisch-rechtlichen, sachlich-rechtlichen und theoretischen Fragen – dies auch bei der Auseinandersetzung mit praktischen Fragestellungen – entfaltet, mit denen sich im Zusammenhang mit der Vulgarsubstitution die römischen Juristen befasst haben und die nach ihnen auch die heutigen europäischen Juristen beschäftigen.

Was den slowakischen rechtsgeschichtlichen Kontext anbelangt, weise ich auf die Tatsache hin, dass die Substitution im Erbrecht und ihre Arten im slowakischen Recht bereits seit der Annahme des Bürgerlichen Gesetzbuches – Gesetz Nr. 40/1964 der Gesetzessammlung zwar *ex lege* nicht realisiert wird, jedoch war dies im Bereich der ungarischen Zivilistik (bis 1918) und der Zivilistik der ersten Tschechoslowakischen Republik nicht der Fall. Auf der anderen Seite wurde das erwähnte Institut von der Rechtsprechung nach 1964 im Umfang einer extensiven Auslegung des [Paragraphen] 478 des Bürgerlichen Gesetzbuches zugelassen.

Die vorliegende Monographie wurde von V. Kleňová in fünf Kapitel aufgegliedert (samt Einleitung und Schlussfolgerungen). In der Einleitung hat sie sich mit dem Willen des Erblassers und seiner Freiheit, einer Genese des römischen Testaments und mit den Beschränkungen der Testierfreiheit beschäftigt.

Das erste Kapitel hat sie als *Substitutiones et substitutio vulgaris* bezeichnet. Bei der Substitution ging es um die Bestimmung eines Ersatzerben (Substituten) nach der Erfüllung einer aufschiebenden substitutionellen Bedingung *(conditio substitutionis),* wenn der ernannte Erbe (Institut) aus verschiedensten Gründen die Erbschaft nicht antritt, oder im Falle, dass er das Erbe ausschlägt. Die Autorin hat der Vulgarsubstitution im System der römisch-rechtlichen Substitutionen und ihrer großen Beliebtheit in der römischen Testierpraxis eine fundamentale Stellung bestimmt (S. 38).

Das zweite Kapitel bezeichnete sie als *Substitutio vulgaris et institutio heredis*, wobei man mit Sicherheit feststellen kann, dass sie die alternative Beziehung von beiden Arten hinsichtlich der Erbeinsetzungsfähigkeit *(testamenti factio passiva)* – Institution und Substitution richtig hervorgehoben hat.

Im dritten Kapitel mit der Bezeichnung *Delation ex substitutione* hat sie mehrere (auch gegenwärtige) Institute behandelt: Enterbung, Erwerbsunfähigkeit/bzw. Erbunwürdigkeit, bzw. eine wichtige Frage hinsichtlich der Aufrechterhaltung der Gültigkeit oder Wirksamkeit des Testaments, das eindeutig mittels Substitution auf die Weise aufrechterhalten werden sollte, dass die Delation *ex substitutione* angetreten ist.

Im vorletzten Kapitel thematisierte die Autorin einzelne Formen der Vulgarsubstitution im Hinblick auf die Subjekte der Institution und Substitution. In diesem Kontext konnte auch eine andere, eine dritte Person, oder das Institut selbst Substitut werden, oder aber wurde der Miterbe mittels einer gegenseitigen (reziproken) Substitution zum Substituten. In diesem Kapitel hat sie aber auch einen Fall hervorgehoben, in dem die Person des Substituten mit dem Institut identisch war, unter der unerlässlichen Bedingung einer Veränderung der Causa bei beiden Institutionen. Sie hat sich auch mit einer sehr häufigen Form der Substitution – mit der gegenseitigen Substitution der Miterben *(reciproca substitutio)* auseinandergesetzt, bei der es zum gegenseitigen Substituieren mehrerer Institute kommt und zwar auf die Weise, dass, wenn einer von ihnen wegfällt, die anderen seine Stelle antreten (S. 142). Bei diesem Thema ist es sehr wichtig, sich zum Recht der Akkreszenz (Anwachsungsprinzip) des Miterben und seiner Beziehung zur gegenseitigen Substitution zu äußern und die Autorin hat darauf in einer selbständigen Abhandlung reagiert, wo sie ihre gemeinsamen und unterschiedlichen Merkmale definiert hat.

Das fünfte Kapitel (Abschlusskapitel) hat sie einem speziellen Fall der *substitutio tacita* gewidmet, einer verschwiegenen oder versteckten Substitution, die im Testament ausdrücklich oder explizit bei der Institution der Erben nicht bestimmt wurde, die jedoch in interpretatorischer Hinsicht angenommen wurde. Der Wille der Person, die das Testament errichtet hat, wurde zu einem interpretatorischen Ausgangspunkt. Dieser Wille ist in dem Sinne zu interpretieren, dass sich diese Person eine Interpretation ihres Testaments im Einklang mit der Substitution gewünscht hat, oder aber hätte sie dies, alle später eintretenden Umstände in Erwägung ziehend, bedingt gewünscht (S. 165).

Zusammenfassend kann man folgende Bewertungen hervorheben: Die Autorin hat das vorliegende Institut in seiner ganzen historischen Entwicklung verfolgt, insbesondere vor dem Hintergrund der Testierfreiheit des Erblassers – wie diese aufgenommen wurde, sie hat sowohl Unterschiede als auch Gemeinsamkeiten in der Rechtsstellung des Instituts reflektiert, die Höhe der Anteile und ihre rechtliche Qualität, Fristen und Bedingungen (oder ohne Bedingungen), die für den Erwerb der Erbschaft bestimmt worden waren, Subjekte der Substitution und auch die gegenseitige Substitution zweier oder mehrerer Institute mit dem Recht der Akkreszenz eines gelösten Anteils, oder der für die Substituten bestimmten Anteile. In der Einleitung hat sie selber zugegeben, dass es ihr Ziel ist, das ganze Institut der Vulgarsubstitution zu erfassen, seine grundlegenden Merkmale zu benennen und seine Beziehung zu anderen testamentarischen Dispositionen klarzumachen. Dies betrifft auch die Regeln und Prinzipien des römischen Erbrechts und vor allem das Prinzip der Generalsukzession (S. 14) .

Ihr Stil ist von einer strengen Logik geprägt, womit sie ein originäres, alt-neues Rechtsdenken kreiert hat, das für die ältere Rechtswissenschaft aus der Zeit vor dem Jahr 1950 charakteristisch war. Die Relevanz dieser Feststellung unterstreicht auch die Gelehrtheit der Autorin in der lateinischen Sprache, in der sie oft die betreffenden römisch-rechtlichen Maximen und Zitate nicht nur aus den Digesten zitiert hat und obwohl sie sie oft auch übersetzt hat, hat sie dies in vielen Fällen nicht getan. Auf diese Weise hat sie erhöhte Ansprüche an die Leser gestellt.

Slowakische Rechtsgeschichte kennt die Kontinuität des angeführten Instituts im europäischen, aber auch ungarischen (bis 1918), bzw. slowakischen Erbrecht sehr gut. Aus diesem Grund valorisiert und aktualisiert das angeführte Werk aus rechtsgeschichtlichem Blickwinkel die römisch-rechtliche Genesis der Autorin sowohl im Kontext der vergangenen als auch eventuell einer zukünftigen Rechtsordnung, in die das angeführte Institut in der gesetzlichen Form eines neuen Bürgerlichen Gesetzbuches zurückkehren sollte. Die vorliegende Monographie kann ich sicher nicht nur den Rechtshistorikern und Romanisten empfehlen, sondern mache auf sie auch die Zivilisten aufmerksam; sie finden hier zweifellos bereits bei erster Bekanntmachung einiges zum Inspirieren.

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